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BOOK REVIEW

Does Duncan Kennedy Wear Briefs or Boxers? Does Richard Posner Ever Sleep? Writing About Jurisprudence, High Culture and the History of Intellectuals

JOHN HENRY SCHLEGEL†

Neil Duxbury has written a quite enlightening book about American legal thought since the Civil War.¹ Before uttering even a word of the text he discloses his view of his subject with an extraordinary gesture. The dust jacket has a full color picture on it, a rarity in academic publishing these days. Duxbury fought with his publisher for this picture, Edward Hopper's painting, *People in the Sun*, a laconic view of business-dressed humans, more reclining than seated, on a deck or terrace facing into the late afternoon sun. One seems to be reading something; the others simply seem to be enjoying the warmth. The significance of the cover is not apparent until one reaches the introduction, entitled "Jurisprudence as Intellectual History."² So, it

† Professor of Law, State University of New York at Buffalo. This essay reflects concerns of mine that I have tried to express in the *Afterward* to AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995). Earlier I raised these concerns in different ways in *The \$10,000 Thousand Dollar Question*, 41 STAN. L. REV. 435 (1989) and *A Tasty Tidbit*, 41 BUFF. L. REV. 1045 (1993). My concerns date back to arguments I first engaged in with Bob and David over twenty years ago and that I continue with them to this day. A not so chance remark by Dorothy focused this particular presentation of my ideas, a presentation that Bob and Laura tried to improve. Endless discussions with Fred are buried in the following pages. Discussions with Al and Pierre about the place of reason in academic life have finally made me comfortable enough with that very troublesome word to use it in print. Others who have known and tried to help with my obsession include Guyora, Alan, Janet, Isabel, Betty, Avi, Ray, Rob, Peter and Ted. All of these individuals usually have been patient with me, for which I thank them publicly. All also know that on this subject I cannot be reasoned with. Avi did a *mitzvah*.

1. NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995).

2. DUXBURY, *supra* note 1, at 1.

is as if the individuals in the picture are passively receiving the warmth to be derived from the parade of American jurisprudential thought as it unfolds over time.

I have never seen the dust jacket of Martin Jay's recent book *Downcast Eyes*.³ It is an extended discussion of the decline of what he calls "ocularcentrism,"⁴ the privileging of sight for acquiring, and metaphors related to sight for describing the acquisition of, knowledge of the world, as a result of sustained critique in France in the late Nineteenth and especially the Twentieth Century. Given the book's argument it would have been odd for Jay to have insisted that his publisher place a picture on the book's dust jacket. But, had Jay wished to make an ironic gesture, he might have demanded reproduction of a painting of an author in a rather dark Paris apartment writing away amid a mess of books, coffee, cigarettes, crumbled paper, and maybe a largely empty bottle of wine. A dust jacket for an equally fine book, Dorothy Ross's *The Origins of American Social Science*,⁵ might have had a similar picture, though the interior would be that of a dark university office, bookshelves bulging, a narrow leaded glass window in the background and, of course, much less disorder in the foreground.⁶ No one else would have been seen in either picture for, as best as one can tell from either book, intellectual activity is a variation on the pastime of playing chess by mail.

The combined image from these real and hypothetical dust jackets is one of ideas, generated by humans closeted in their apartments or offices, that somehow passively warm, maybe even illuminate, a populace. This is the understanding of the high culture of the North Atlantic that one gets from reading much of the best intellectual history written today. Thus, it makes perfect sense for Duxbury to choose intellectual history as a model for his work in jurisprudence, a somewhat neglected branch of philosophy that by definition has no human actors except in their abstract capacity as citizens, lawyers, judges and the like. He notes:

Ideas have histories, and jurisprudence is a much more enlightening and engaging enterprise when it focuses on those histories. When we concern ourselves with the history of ideas about law, we are likely to appreciate not only how certain ideas come to be discredited, but also, equally im-

3. MARTIN JAY, *DOWNCAST EYES* (1993).

4. *Id.* at 3.

5. DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* (1991).

6. I am told that the actual dust jacket sported a reproduction of Jasper Johns' painting, *Flag*. I doubt whether that choice has any deep meaning.

portantly, why they were ever considered to be significant in the first place.⁷

But is this a sensible way to represent the life of the mind during the past 130 or so years? When one leaves the cloistered halls of intellectual history proper and examines biographies of participants in the high culture of the North Atlantic, one gets an entirely different view from the one offered by Duxbury, Jay and Ross. No matter where one looks in the intellectual terrain—authors, poets, painters, architects, composers, philosophers, even the theoretical physicists who are apt representatives of the science that David Hollinger has taught us is an integral part of high culture in this century—one sees people doing things other than thinking and writing. One sees them falling in love, coping with families, fighting with institutions or colleagues, enjoying friends, teaching, moving about; in other words they can be found living and dying. Thus, from biography one gets an entirely different representation of what it is to be an intellectual, to participate as a creator of high culture. Even the most ordinary biographer of a not particularly significant individual sees the difference. Consider the way Max Dresden put it in his biography of the Dutch physicist H.A. Kramers:

It is possible that by ignoring all mistakes, all false clues, all misdirections, an efficient, smooth presentation of a scientific field or the life of a scientist could be given. (Most textbooks follow exactly that method.) But it is not good history: It gives a false and misleading picture of the progress of science and it misrepresents the role of most scientists in scientific evolution. A serious biography must address the background and motivation of an individual, his hopes, expectations, fears, ambitions, the relation of his science to his life, his relations to his friends, peers and relatives. But a scientist neither lives nor works in a vacuum: The status of his science, the role of the science in the prevailing culture, the political and financial circumstances—all these will affect his science and his scientific productivity. It is only an analysis of that complex amalgam that can do justice to the richness, the variety and the subtlety of a life devoted to science.⁸

Substitute “poet” or “artist” or “composer” for “scientist” and “poetry” or “painting” or “music” for “science” and one might say the same thing about such individuals and the best biographical practice follows Dresden’s prescription. Yet, this prescription falls by the wayside when it comes to the generic category “intellectuals,” individuals just as deeply enmeshed in high culture

7. DUXBURY, *supra* note 1, at 7.

8. MAX DRESDEN, H.A. KRAMERS: BETWEEN TRADITION AND REVOLUTION xviii (1987).

as all of the others, indeed, individuals who, on one view, are particularly essential to high culture for they provide the ideas, the theories that make high culture generally understandable. Biography recedes; "hopes, expectations, fears, ambitions" become faint, at best; "the role of the . . . [intellectual] in the prevailing culture, the political and financial circumstances" are reduced to outlines; "friends, peers and relatives" disappear.⁹ Why do intellectual historians persist in seeing the world this way? This is the question that I wish to ask using, with the author's permission,¹⁰ *Patterns of American Jurisprudence* as my starting place.

Duxbury writes to refute what he calls "the 'pendulum swing' vision of American jurisprudential history,"¹¹ the notion that "first there was formalism, epitomized by the Langdellian revolution; then came the realist revolt against formalism; after which came the renaissance of formalism, exemplified by both process jurisprudence and law and economics, which was in turn superseded by Critical Legal Studies."¹² Rather, Duxbury argues that the history of American Jurisprudence is one of a "complex patterns of ideas."¹³ "Ideas—along with values, attitudes and beliefs—tend to emerge and decline, and sometimes they are revived and refined. But rarely do we see them born or die. History is not quite like that."¹⁴ This point is well taken; odd evidence for it comes from a friend who regularly laments that he teaches at a place where legal process jurisprudence is alive and well, though, of course, "we all know" that it was dead by 1970. Yet, Duxbury does not follow the seeming import of his own advice by offering a history of the waxing and waning of

9. *Id.*

10. I exchanged a series of letters with Neil with respect to a criticism he made of my book in a review published in 9 *RATIO JURIS* 198 (1996). That criticism, which could be loosely translated into, "But where are the ideas?", brought to the fore old questions about the practice of intellectual history. At the conclusion of that exchange Neil urged me to amplify my ideas and offered his book as a convenient target. Independently, Howard Erlanger made that target available when he offered the chance to review Neil's book in *Law and Social Inquiry*. Since a second review had repeated Neil's criticism, James E. Herget, Book Review, 39 *AM. J. LEGAL HIST.* 396 (1995), confirming my impression that I had not adequately explained my understanding of the practice of intellectual history, I accepted Howie's offer. When the result of my labors far exceeded either his or my expectations, Howie graciously released me from my obligation to him. The *Review* kindly offered the orphan a home. I thank both Neil and Howie for their timely generosity. After reading the results each may regret his gesture.

11. DUXBURY, *supra* note 1, at 2.

12. *Id.*

13. *Id.*

14. *Id.* at 2-3.

each of the main ideas in American jurisprudence over the past 130 years. Indeed, he simply treats the standard list of topics—formalism, realism, law, science and policy, legal process, law and economics and Critical Legal Studies—in the standard order.

I would not fault Duxbury for presenting the standard topics in the standard order, much as it would be interesting to see someone try a new form of presentation—formalism or anti-formalism, if those really are plausible categories, in American jurisprudence over the past 130 years. The old topics are well demarcated, though often not very clear in detail, and these demarcations are sufficient to anchor the wonderfully rich, sensitive and sympathetic, but not uncritical chapters on legal process and law and economics that are by themselves well worth the price of the book.

Duxbury, however, does not start with these two topics. His opening two chapters on formalism and realism form a unit designed to demonstrate that the commonly accepted idea of a “revolt against formalism”¹⁵ in late nineteenth-century American intellectual life is, certainly as far as jurisprudence is concerned, a myth. For Duxbury, the great proto-realist champions of anti-formalism—most notably Oliver Wendell Holmes, but also Benjamin Cardozo, John Chipman Gray and Roscoe Pound—were on many jurisprudential issues, resolute formalists; likewise, many of the legal realists who followed in their footsteps seemed equally unable to rid themselves of similar formalist prejudices.¹⁶ This proposition seems to me to be unexceptionable as far as it goes. Transitional figures are transitional figures; they look in both ways. And realism was never a completely worked out jurisprudence. What is, however, interesting is the way that Duxbury goes about demonstrating his proposition.

Formalism, maintains Duxbury, comes in two species. One is the Langdellian science of law in the universities and the other is an “entrenched faith in *laissez-faire*”¹⁷ in the courts. Both are described in quite standard ways. Academic formalism is a way of seeing law as a set of logically arranged propositions—first principles, later rules—for some exemplified in, for others derived from, appellate cases and applied by courts in the proper resolution of disputes. Concomitantly, legal education is the activity of learning the proper method of so identifying the law through the study of cases. Judicial formalism, on the other

15. *Id.* at 10.

16. *Id.*

17. *Id.* at 11.

hand, is a preference, derived from the writings of Darwin and Adam Smith, for a government that interferes to a very limited extent with the working of markets, especially markets for labor and goods. This is a preference that its exponents were willing to enforce through the use of the Commerce and Due Process clauses of the Constitution.

While clear and generally correct, Duxbury's flat presentation of formalism in some measure obscures the fact that dividing formalism into two parts is a key step in his implicit argument that formalism is a way of seeing and dealing with law that has no regular relationship to the underlying substantive disputes that animate political life; it is not necessarily associated with conservative politics. This implicit argument should not pass unnoticed. As Mark Twain is supposed to have said, "History never repeats itself; but it rhymes."¹⁸ Consider that by some lights both legal process and law and economics are formalisms.¹⁹ Note also that virtually everyone recognizes the con-

18. Quoted in Alan D. Boyer, *Activist Shareholders, Corporate Directors and Institutional Investment: Some Lessons from the Robber Barons*, 50 WASH. & LEE L. REV. 977 (1993).

19. Exactly what we mean by "formalism" is an increasingly vexatious topic. Back when Morton White first told us of the revolt against formalism it all seemed quite clear. Over time it has seemed far less clear, at least to me. The problem can best be identified by looking outside law.

Which direction is the movement from Wagner, through Strauss and Debussy, to the early Stravinsky and finally Schönberg? How about from Ingres, then Manet, through Renoir and Monet, to Cezanne and on through the cubist Picasso, then the Picasso of *Damoiselles D'Avignon*, to Franz Klein and Jackson Pollack? Which way does that path lead? What then of Flaubert to Henry James to James Joyce? Or try Wordsworth to Hopkins, then Pound, Yeats and Eliot, to say Auden and Spender? Or Greek Revival architecture through Adler and Sullivan, then Wright, then Gropius, to Mies van der Rohe and Phillip Johnson? Surely in some sense all of these lines of descent are toward a kind of formalism from something that might be called what? "realism," surely not!

Now there is no rule that says that all of high culture has to move in the same direction at the same time. But from this range of examples it is tolerably clear that there is little coherence behind the concept of formalism. Around the turn of the century in art and architecture, it might possibly be nothing more than a sobriquet for "The children think that their parents are a bit uptight!" After World War II it may mean something else, perhaps "disclosing or made up of basic forms," a definition that might cover those two areas and maybe music. But poetry and the novel is another matter altogether.

My guess is that the way out of this mess is the clear identification of the opposite of "formalism" in all of these areas, but that is by no means an easy task. Even in law, where we have known the term for this opposite for a long time, that work is only now beginning. Here Duxbury's effort, noted in the text below, to tie "realism" to a usage in social science directed toward looking "realistically" at the socio-economic conditions brought about by industrialization seems helpful. The "realistic" novels of Dreiser and Sinclair Lewis might also be a key.

servative political tilt to law and economics scholarship. And its pretense toward science is starkly reminiscent of the similar Langdellian pretense. Despite Laura Kalman's arguments to the contrary²⁰ and to a lesser extent Duxbury's own, the conservatism of legal process jurisprudence seems equally manifest. Support for *Brown*²¹ by northern legal academics is hardly evidence of leftist views in a McCarthyite America that distorted the entire political spectrum while fleeing from a red menace that, while it was a real threat abroad, was but a modest nuisance here, at least unless one is willing to see the sit-down strike and Harry Bridges' longshoreman's union as a threat to the American way of life, a real stretch given the degree of worker control in Western Europe's various capitalism's. The virtually unanimous disapproval by the legal process types of the other landmarks of the Warren Court,—*Mapp*,²² *Escobedo*,²³ *Griswold*²⁴ and *Baker v. Carr*²⁵—is better evidence of their political orientation.

The rhyming of formalist views of law and conservative politics, while hardly necessary, is not surprising. As Ed Purcell's wonderful, if a bit benumbing, book shows,²⁶ formalism is an easy way of justifying a result that is controversial, maybe even embarrassing, when defended on substantive grounds. A conservatism that is under attack or reacting cautiously to a dominant liberalism will find it easier to talk in code, to deny the politics at the root of the enterprise, if that code is a plausible formality. All of which is not to say that a liberalism never resorts to formalism. Free speech doctrine is a notorious formalism, cleverly taken advantage of by the conservative advocates of commercial speech, and the defense of affirmative action in the past ten or so years has been notably formal, whether the affected class be race or sex. Still, rhyming is an important clue to the meaning of a jurisprudence in history, that is, in a time and place. Duxbury's approach obscures that clue.

Once academic and judicial formalism are distinguished, it is rather easy for Duxbury to show that the usually named realist forerunners—Holmes, Cardozo, John Chipman Gray and

20. LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 22-54 (1996).

21. *Brown v. Board of Education*, 347 U.S. 483 (1954).

22. *Mapp v. Ohio*, 367 U.S. 643 (1961).

23. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

24. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

25. 369 U.S. 186 (1962).

26. EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICAN 1870-1958* (1992).

Pound—are really caught in “the jurisprudential drift from formalism to realism”²⁷ and so formalist and realist in varying, and varyingly explicit proportions. This accomplished, he can turn to realism.

For Duxbury realism is not a movement, not a celebration of uncertainty and definitely not a jurisprudence of judicial tyranny, but an “intellectual mood”²⁸ that accompanied the recognition that “law is political.”²⁹ And what was that mood? After sensibly dismissing the idea that realism should be seen, as it often has been, through the famous Llewellyn-Pound debate, Duxbury connects “realism,” as a self-appended label, to the view, gaining currency starting in the late nineteenth century, that social science was an appropriate way of depicting contemporary reality, the reality of a newly industrialized America.³⁰ Thus, Duxbury argues that realism’s appeal to science, not as rational ordering as it had been for Langdell and his followers, but as a kind of empiricism, in particular to social science empiricism, is essentially a response to both of the aforementioned late nineteenth century formalisms.

Unfortunately, Duxbury faces a problem with his own understanding of realism as a reaction to formalism in its two guises. While there is much that he can and does say about realism and social science, most of it is directed not at judicial formalism, if by that is meant specific doctrinal results that such formalism brought, but rather at one aspect of academic formalism, at what might be called the political theory underlying the justification of formalism, in particular, notions about the economic ordering of American society and the nature of judicial decision-making. And even here he has limited resources. For example, while psychology can be covered by Thurman Arnold and Edward S. Robinson, all Duxbury can do to bridge to the relevant economic literature is a nod in the direction of Llewellyn, who once wrote a review of Commons’ *Legal Foundations of Capitalism*, and the work of Robert Lee Hale, admittedly relevant, but from an individual at least socially marginal to the realist group and maybe intellectually marginal to most of them. Still, Duxbury’s presentation of the actual social scientific work done by the realists and of the work on judicial decision-making by Frank in *Law and the Modern Mind* and on pragmatism and

27. DUXBURY, *supra* note 1, at 54.

28. *Id.* at 4.

29. *Id.*

30. *Id.* at 79-82.

predictivism is sound and persuasive.³¹

Once Duxbury puts science aside and attempts to link realism directly to judicial formalism—the constitutional controversies of the day—and to the rise of the regulatory state, another difficulty appears. There is little realist writing on either topic. Here Morton Horwitz's recent book might be of some help.³² Though Duxbury implicitly rejects, correctly I believe, Horwitz's identification of realism with a revolution in legal doctrine, some of realism was played out in the doctrinal details. But this play was in the traditional common law doctrinal categories bequeathed to the law professorate by Langdell's law school and not in the areas of constitutional and regulatory law where, on Duxbury's thesis, reaction should have come. And not surprisingly so, since reaction in these areas could only have come in the mid-Thirties at a point when realism had begun to fragment in response to age and the pull of New Deal policy-making. This inexact fit between realism, doctrinal scholarship and judicial formalism and the similar inexact fit between realist educational reforms, realist social science and academic formalism complicates Duxbury's story just enough to make the reader barely notice that the choice to see realism as a reaction to formalism undercuts the pattern notion that Duxbury begins with.³³

31. As to the aspect of academic formalism directed toward legal education, Duxbury's discussion recognizes that realism worked to reorient rather than jettison the case method and case books.

32. MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* (1992).

33. Were Duxbury to treat realism and formalism as inextricably bound together, as if each were incomplete without the other, the notion of patterns of thought that he presents might be maintained by asserting that legal process, law and economics and Critical Legal Studies were each an equally complex mixture of formalism and realism. For example, legal process might be said to have a formalist understanding of the capacities of governmental entities, but a realist concern with the "real world" consequences of judicial decisions. Law and Economics might be said to combine a formalist understanding of the nature of markets with a realist concern with the "real" costs of governmental economic programs. And Critical Legal Studies surely offered a quite formalist understanding of the structure of legal doctrine at the same time that it offered a very "real" perception of the impact of law on America's underclasses.

I suppose that by suggesting this possibility, I am admitting that I have been reading too much about Foucault of late. Though such an approach would require a significant amount of historical falsification, as well as a firm sense of what is meant by formalism, *see supra* note 19, it is nevertheless intriguing. As Al Katz taught me, all theories distribute precision and vagueness in one way or another, as if Heisenberg's uncertainty principle ruled thought, as well as atomic entities. A formalism is, I think, a species of conceptual precision bought at the expense of detail; realism, a kind of detail bought at the expense of conceptual vagueness.

After a brief and, on Duxbury's understanding of American jurisprudence as a pattern of ideas, unnecessary discussion of Lasswell and McDougal's venture into law as a policy science,³⁴ he turns to the largely post-war legal process movement. Though this is not the first serious attempt to recover this movement,³⁵ Duxbury's is notable for the distanced care, concern and sympathy with which the movement is presented, a presentation that in many ways is the most illuminating in the book.

While for Duxbury realism is a never quite fleshed out mood, process jurisprudence is for him an "attitude."³⁶ This attitude was developed "in order to cast light on . . . the principal problems in the creation and application of law"³⁷ and at its heart is, as the chapter title makes clear, a "faith in reason."³⁸ Thus, process jurisprudence may be contrasted with formalism and realism in that it "marks the beginning of American lawyers attempting to explain legal decision-making not in terms of deductive logic or the intuitions of officials, but in terms of reason which is embedded in the fabric of the law itself."³⁹ The key phrase here is "embedded in the fabric of the law itself," for logic, as in doctrinal logic, is a form of reason, as is, I would argue, intuition, even if that intuition comes from judges. And the key usage is "law" meaning, not doctrine, for it was surely the formalist claim that logic inhered in the fabric of law taken as doctrine, but instead meaning "law" as the process of law-making.

In keeping with his notion of pattern, Duxbury notes the antecedents of process including Ames' assertion that the point of the case method was not to teach doctrine, but to teach the ability to "think like a lawyer"; Robert Hutchins' emphasis on Aristotelian concepts of reason and principle; Pound's emphasis on the growth of the common law and on the principles revealed as inherent in that growth; Cardozo's reliance on principle for making decisions; the work of Gray and of John Dickinson, a Pound student; and the early Thirties pieces by Felix Frank-

34. I say unnecessary because Lasswell and McDougal are only significant if seen as a reaction to realism from the party of the left that matches the reaction from the party of the right that is legal process jurisprudence.

35. The first is G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973), a piece that still bears reading. See also KALMAN, *supra* note 20, at 22-54. Kalman also does a fine job of recreating legal process in her work.

36. DUXBURY, *supra* note 1, at 207.

37. *Id.*

38. *Id.*

39. *Id.* at 207.

furter and Henry Hart that examined the business of the United States Supreme Court with the message that the court should not be making national policy.⁴⁰

However, all of this is prelude to serious business—Lon Fuller. Fuller's secular natural law theory was premised on the centrality of the moral dimension of law and on the belief that such a moral dimension "entails the recognition that legal institutions ought to be founded upon the values of individual freedom and democracy; and [that] the recognition of these values requires, in turn, the recognition of reason at the heart of law."⁴¹ Fuller thus places reason at the center of (common law) judicial activity, an activity that is properly directed toward discovering and applying principles that underlie and promote group life, and at the center of statutory judicial activity, an activity that is properly directed toward discovering and interpreting principles underlying legislative action. All of this follows from Fuller's principle of institutional competence: human institutions have of their nature things that they do best. Courts best adjudicate disputes in accordance with the (common law) principles and the legislative purposes advanced by the parties to a dispute who assert a right to a particular outcome.

Fuller's work is at the root of all legal process thinking and so all that follows is, in effect, a refinement of that thinking.⁴² Duxbury recounts all of these refinements, including the Fifties Harvard Law Review "Forwards;" Alexander Bickel and Harry Wellington's discovery of reasoned elaboration; Henry Hart's advocacy of reasoned elaboration; Herbert Wechsler's plea for neutral principles, a plea clearly tied to worries about the activism

40. There is a problem with reaching back this far and in this many directions at once. Whatever may be the case with Ames, Langdell and other mid-to late Nineteenth Century legal thinkers believed that "principle" and not rule or doctrine was the operative unit of law. While Hutchins clearly meant something different from Langdell, and Dickinson may have too, in the years before 1930 usage was still in enough of a flux that meaning is often obscure. Cardozo, in particular, regularly trades on the ambiguity in the meaning of "law." And Pound's usage is anything but firm. All of which is not to say that antecedents cannot rightly be found; only that the antecedents are themselves transitional and so weaker than their texts standing alone might at first appear.

One significant antecedent is curiously missing from this list. The distinction between principle and policy can be found in the work of Joseph Beale, as solid a Langdellian as can be found. This example of usage only emphasizes the way in which these antecedents are wrapped up in other ways of thinking.

41. DUXBURY, *supra* note 1, at 225.

42. Duxbury attempts to tie the work of the legal process scholars to the work of Fifties political scientists such as V.O. Key, David Truman, Robert Dahl and Daniel Bell and Joseph Schumpeter. It is a bit of a stretch, but the resonances are interesting, evidence more of a shared concern for democracy and less of cross fertilization.

of the bad old Thirties Supreme Court; and Bickel's emphasis on judicial passivity when no principled basis for a decision could be found, but only one based on policy, and so by his lights "political," considerations. The centerpiece of the discussion is, however, the legal process materials created for the course of that name offered by Hart and Albert Sacks. Here Duxbury emphasizes the concept of the "soundness," an echo of professional or craft norms, of a judicial decision as central to an edifice that was filled out with distinctions between rules and standards and principles and policies, as well as with reasoned elaboration, purposive interpretation of statutes, the notion of the maximization of human wants imported from Pound and the expanding social pie.

After a nod in the direction of later scholars working in the process tradition, Jesse Choper, John Hart Ely and Ronald Dworkin, Duxbury concludes:

If so-called realists were concerned with telling it—"law"—as it is, process jurists are concerned primarily with explaining how it ought to be. For, regardless of how it might appear to work in reality, law, from the process perspective, must always be understood in the light of the faith: that is, as an institutionally autonomous activity founded in reason.⁴³

There is much to be said for this conclusion and in particular for two of Duxbury's observations. First, it is helpful that Duxbury has pointed out the scraps of process theory embedded in what are generally taken to be many different kinds of legal theory; many scholars miss that. Second, it is important to recognize, as Duxbury has, that process scholars grappled seriously with the real problem of deciding just what were the requirements of reason in adjudication; again, many scholars miss that. And yet, once one shifts from Fuller and his profound disagreements with realism, to Bickel, Hart, Wechsler and Wellington, the odor of Supreme Court politics—the Black-Douglas-Murphy-Rutledge block in the Forties and the Warren Court and its *Brown* decision in the Fifties—wafts through the air more than Duxbury seems willing to admit. Principle and politics may have been far less divorced in practice than in theory.⁴⁴

43. DUXBURY, *supra* note 1, at 299.

44. It is interesting to note that, as Duxbury tells his story, just as there are two formalisms, there are two legal processes. One would be Fuller's emphasis on reason, elaborated in the Hart and Sacks materials; the other, Bickel, Hart, Wechsler and Wellington's later emphasis on constitutional law. Fuller's legal process then might be seen as part of a line that starts with Langdell, emphasizing logic, and continues through realism, emphasizing intuition. In contrast, Bickel, Hart, Wechsler and Wellington's legal

A good argument can be made that a discussion of law and economics belongs in a book on the history of American jurisprudence no more than a fish belongs on a bicycle, to steal and mangle a phrase. In response to the normatively ambiguous question—"How are judicial decisions made?"—formalism offers a modestly complex answer—doctrinal logic; realism, a more complex, though not wholly coherent, answer—intuition; and legal process, a quite complex and often nuanced answer—reason. In contrast, law and economics answers a different question entirely—"What judicial decisions should be made?"—with a truly simplistic answer—decisions that instantiate the principles of neo-classical micro-economics.⁴⁵ But in Duxbury, law and economics has found an intelligent, sympathetic reader, one who can truly make the theory the best that it can be, to steal from a quite different author, without falling into hagiography, and so his effort deserves careful review.

Duxbury begins by disputing the often heard assertion that law and economics is a child of realism. The two, he argues, are distinct particularly because realism's faith was in the social sciences generally, while law and economics' faith is in but one social science methodology; it rejects the others. Moreover, most of

process might be seen as part of a line that starts with, not Langdell, who barely tolerated constitutional law in his law school, but with treatise producing-judges, such as Thomas W. Cooley and John F. Dillon, who wrote on the constitutional limitations on state governmental authority and so emphasized the correctness of the work of the turn of the century Supreme Court. Next would come, as a counterpart to realism, the work of Court critics that starts with James Bradley Thayer and includes Pound, the political scientists Charles Grove Haines and Thomas Corwin and, of course, Felix Frankfurter, persons marginal to Duxbury's account of realism, and rightly so. On this view the unusual thing about process jurisprudence is that it manages to unite these two strands of thought and so signals the shift in the legal academy from a central concern with private, common law to public, constitutional law that is so evident today.

45. I see no reason to hide my utter incredulity at the large following that law and economics has drawn in the academy. To offer its ruminations as an example of science when theory testing is all but foreign to the activity, as is the math that is central to most university economics departments, is more than I can bear. And a science so divorced from the world that humans inhabit as to offer its prescriptions based on a system that assumes perfect competition, ignores transaction costs and treats the distribution of economic entitlements as outside of its ken is a science much like phrenology, unrelated to the society we know and live in. See Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877 (1997). At least we in Critical Legal Studies admitted that, whatever we were doing, it was not science. At times we were even willing to admit that ours was an ideology—though only at night when too much alcohol had been consumed. The only explanation for the growth of law and economics beyond its political content is that it has the virtue of giving determinate solutions to normative legal questions and that is still what counts in the legal academy. See John Henry Schlegel, *Talkin' Dirty*, 21 L. & SOC. INQUIRY 981 (1996); Pierre Schlag, *Normative and No Where to Go*, 43 STAN. L. REV. 167 (1990).

its focus is on the substance of decisions and not on decision-making as was the case with much of realism and legal process as well. Duxbury then sets law and economics apart from the scholarship that might be known by the same name that took place during the first half of the Twentieth Century. This work by individuals such as Commons, Berle and Means and Chamberlain,

. . . was composed of little more than a mixed bag of lawyers and economists attempting to demonstrate that, to the pressing economic problems of the day, there existed definite legal solutions. Modern legal-economic analysis, in contrast, is concerned primarily with demonstrating that there may exist convincing economic solutions to particular legal problems.⁴⁶

This distinction seems to me to be essentially correct. It both explains exactly how Duxbury presents the balance of his story and affirms the reason why I earlier questioned including law and economics in a discussion of American jurisprudence.

Duxbury then turns to the work of Henry Simons and Frank Knight in the economics department at Chicago in the years immediately preceding World War II. Knight was a dominating and captivating person who came to the University with Simons, who was one of Knight's graduate students. During a fight over Simons' tenure, Knight managed to move his student to the faculty of Chicago's law school. There Simons began selling his brand of *laissez-faire* but, at least originally, not minimalist state economics, while Knight, who was influential in securing an appointment at the university for Frederick von Hayek, preached a gospel that emphasized the relationship between political freedom, economic choice and optimal resource allocation. When, immediately after the war, Simons died quite prematurely, he was replaced by another Knight student, Aaron Director. Director, who taught the economics part of the anti-trust course with Edward Levi, began to push his notion that the market was a more efficient regulator of anti-competitive behavior than the government. In due course Levi shifted from being an anti-trust advocate to supporting Director's then unfamiliar, but soon easily understandable, notion.⁴⁷ In a real sense from here on the advance of law and economics was smooth sailing down hill, to mix metaphors.

46. DUXBURY, *supra* note 1, at 417.

47. I must note here that I know from personal experience that Director was an excellent teacher.

Though for a while there were competing schools of anti-trust analysis at Harvard and Chicago, with the conversion of Harvard's Donald Turner to the proposition that the object of anti-trust enforcement is not the protection of competitors by attacking anti-competitive practices, but rather the maximization of consumer welfare by efficient allocation of resources, Chicago swept that field, a sweep belatedly memorialized by Robert Bork's book on the subject.⁴⁸ Then the question became what other fields could neo-classical economics conquer. Central is the work of George Stigler, who tried to close any even small opening for state regulation of the economy in Adam Smith's theory, and Milton Friedman, an indefatigable empiricist, who posited that if individuals did not in fact act out of rational self-interest it was enough that they acted "as if" they were so motivated. Reasonably quickly the Chicago economists demonstrated, to their satisfaction at least, that less government intervention in the economy, fewer policies directed toward the redistribution of wealth and more private enterprise was a coherent normative program for the economy. Soon after came Gary Becker who argued that humans were rational utility maximizers throughout a broad spectrum of their social interactions and therefore that economics could be used to understand such seemingly non-market driven behavior as marriage and crime. From there the vista truly opened wide.

In the law that vista brought Armen Alchian and Harold Demsetz to note that property rights might be seen as exchangeable goods. Then Ronald Coase, who had previously argued that the point of the business firm was to escape the transaction costs that appear in markets, generalized his argument to show that, in the absence of transaction costs, it does not matter where rights are placed, because the parties will simply use the market to reach an efficient allocation of costs should the law's placement of rights not impose such an allocation. This was quickly followed with Posner's suggestion that, given the existence of transaction costs, rights should be assigned where the market would place them were there no transaction costs.

By this time objections to all of this Chicago style law and economics were legion. To his credit Duxbury treats the objectors as generously as he treats the economists, though one has the clear feeling that, if he had to choose, his heart would be

48. ROBERT H. BORK, *THE ANTI-TRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978).

with the economists. Most of these objections had to do with the reality of ever engaging in the analysis of a world without transaction costs, the plausibility of setting aside the distributional consequences of economic and legal policies and the slippery nature of the concept of economic efficiency. Eventually, Richard Posner recognized the unsatisfactory nature of the concept of economic efficiency, after being pummeled for adopting a definition that posited that a solution was efficient if the winners in any transaction were *in theory* capable of compensating the losers, even if they were not likely to do so! But, when Posner shifted to wealth maximization as the measure of the economic efficiency of any transaction, the outcry was only worse.

Instead of recounting the treatment of Critical Legal Studies that closes Duxbury's book,⁴⁹ I wish to return to where I began by noticing an absence in Duxbury's text. While Duxbury mentions plenty of names in his book, there are almost no people, no places and no institutions described, no reasons for anyone to say what they are saying beyond a vague background of American political and economic history—industrialization, *Lochner*, the Depression, the New Deal, court-packing, World War II, *Brown*, Vietnam, and Ronald Reagan.⁵⁰ This fact does not negatively distinguish Duxbury's book. The context, the living and dying, is no thicker in either Jay's⁵¹ or Ross's⁵² books, books for whom the watchers on the dust jacket might appropriately be café intellectuals and faculty assembled for a meeting of a learned society, respectively.

In contrast to this way of representing the life of the mind, consider what one might learn were one to look at eight books

49. Duxbury's analysis is serious work, but I am still too close to the subject and have too much invested in my own idiosyncratic understanding of CLS to be fair to his effort. If comment is wanted, see Robert W. Gordon, *American Law Through English Eyes: A Century of Nightmares and Noble Dreams*, 84 GEO. L.J. 2215 (1996). In view of Gordon's criticisms of Duxbury's discussion of CLS, I should note that I believe that Duxbury is correct in arguing that CLS died when it lost interest in its theoretical ideas after discovering that those ideas did not entail the desired political conclusions and so shifted its concerns to the really very different questions of gender and race that its students, spouses, and lovers brought to its door. Those concerns are important; they were not, however, the concerns that made CLS distinctive.

50. There is an exception—Duxbury's chapter on law and economics. All of a sudden there appear to be humans doing things, getting into tenure trouble, holding seminars, helping each other and the like, a sense that there was a real culture in which the relevant individuals participated. Whether this shift is just a matter of having more and more lively source materials at hand or a single locus of action or an identification with the individuals in question I cannot tell.

51. See *supra* note 3.

52. See *supra* note 5.

written about other participants in the high culture of the North Atlantic.⁵³ Mozart was buried in an unmarked grave outside of Vienna because at the time this was the only way that bodies of the residents of Vienna other than nobles could be buried under Austrian law. Beethoven finally secured guardianship over his deceased brother's son by effectively suborning appellate judges through his connections to the Austrian royal family. Edouard Manet died of tertiary syphilis, just as had his father. One of the things that attracted Frank Lloyd Wright to his mistress Mamah Cheney was that she had freed herself from her children by placing them with a nurse or sending them to boarding school. She thus had more time for doing things with Wright than did Catherine Wright who presided over the menagerie that was the six Wright children. W. H. Auden, a confirmed homosexual, married Erica Mann, daughter of the novelist Thomas Mann, so that she could gain a British passport and thus escape from Nazi persecution brought about because she ran a peregrinary anti-Nazi cabaret. Jean Genet regularly stole small items from people who invited him into their homes well after he had any need to sell the pilfered objects to eat and pay rent. Werner Heisenberg belonged to a German youth movement dedicated to revitalizing post-World War I Germany from a supposedly decadent mass society into a Third Reich. Even after he had completed his doctorate Heisenberg regularly spent his vacations camping and hiking with the group of students from his *gymnasium* who were part of the movement. Erwin Schrödinger, who had many serious love affairs, lived for many years in a household that included his wife, his long-term mistress and a child of theirs.

Now, in one sense every one of these bits of information is nothing but pure gossip. Amusing, titillating, odd, scandalous or just strange, they are the material of classic biography; the equivalent of answering the question, "Did Marilyn Monroe sleep with Jack Kennedy?" but about people who are substantially less glamorous.⁵⁴ But in another sense each bit of seeming

53. VOLKMAR BRAUNBEHRENS, *MOZART IN VIENNA, 1781-1791* (Timothy Bell trans., 1st ed. 1990); MAYNARD SOLOMON, *BEETHOVEN* (1977); BETH ARCHER BROMBERT, *EDOUARD MANET: REBEL IN A FROCK COAT* (1996); ROBERT C. TWOMBLY, *FRANK LLOYD WRIGHT: AN INTERPRETIVE BIOGRAPHY* (1973); RICHARD DAVENPORT-HINES, *AUDEN* (1995); EDMUND WHITE, *GENET: A BIOGRAPHY* (1993); WALTER MOORE, *SCHRÖDINGER: LIFE AND THOUGHT* (1989); DAVID C. CASSIDY, *UNCERTAINTY: THE LIFE AND SCIENCE OF WERNER HEISENBERG* (1992).

54. I knew one such fact about Underhill Moore when I wrote about him. After Moore had engaged in at least one, if not more, dalliances in New Haven, Emma Corstvet helped him patch up relations with his wife by selecting suitable gifts for Mrs. Moore. This fact seemed to me irrelevant to understanding either Moore or his work, so

gossip potentially contributes to our understanding of the culture that produced each of these individuals and rendered intelligible the products of their activities—writing music, painting pictures, designing buildings, producing poems or novels, doing theoretical physics. Each of these details both instantiates the culture and helps to explain the ideas and objects that gain their meaning in and from that culture. One can see this relationship by looking at oddly personal details that apparently made a difference in the high culture that each of the eight individuals produced.

Schrödinger seems to have done his best work when in the midst of some erotic entanglement or other, though from his biography it is hard to tell which is cause and which is effect. Werner Heisenberg seems not to have been a particularly gifted mathematician and so he did not recognize that his formulation of quantum mechanics required application of matrix calculus until Max Born, his former teacher, after reading Heisenberg's work in draft, used matrix mechanics to fashion that work into a systematic theory. Genet seems to have run out of novelistic material for twenty years after he had secured enough success to have rendered his autobiography unsuitable material for scandalous transformation into novels. Auden seems to have left England for New York in 1939 both to maintain a more settled working routine and as part of his regular attempts at self-mortification; the result was the great poems of the Forties and Fifties. Wright seems to have wandered during the twenty years after he went off with Mamah Cheney in part because he had run out of architectural ideas after the great breakthrough of the prairie style home. These wanderings brought to his attention the work of Walter Gropius and Le Corbusier, echoes of which can be seen in his work starting with the Johnson's Wax building. Manet seems to have expressed his ambiguity about his bourgeois Parisian upbringing by working constantly to have his paintings accepted for the annual Salon's and simultaneously producing work that, even when accepted, by its content guaranteed that it would be displayed where no one could view it properly. Beethoven's struggle with his brother's widow over the guardianship of his nephew seems to have brought this bachelor to understand human relations in a way that allowed his late style to disclose that far deeper set of emotions most commentators identify. Mozart seems to have shifted from writing serenades and divertimenti to minuets and German dances

and from writing symphonies and concertos to writing operas and chamber music because of his difficulties in securing royal commissions; he redirected his work to bourgeois audiences and so wrote in the forms that those audiences responded to.

At the same time these details might be seen as providing support for understandings of the culture in which each of these eight individuals did their work; consider the following possibilities. In the early Twentieth Century, European academic culture's apparent willingness to tolerate adultery in ways that American academic culture did not serves as evidence of a stronger separation of science and morals. Elegant mathematics, while admired by the turn of the century theoretical physics community, was less important to it than the fruitfulness of new theoretical ideas. The transgressive nature of a novel's subject matter was a significant aspect of critical success in post-war France. Life in the New York City of the Forties and Fifties was already so difficult, so fractured, that choosing to live there could be seen as a self-inflicted wound. Architectural notoriety, even in the age of form follows function, was significantly related to visual distinctiveness. The identification of the romantic in Nineteenth Century music with intense emotion was not wholly a matter of linguistic convention. The growth of a bourgeoisie in late Eighteenth Century Austria provided composers with an escape from the limits of patronage, but at the cost of accepting a different specification of appropriate work.

Now, while these facts tell us something about individual products of high culture as well as about the culture in which such products were meaningful, they tell us little or nothing about the development of quantum mechanics in the early Twentieth Century, changes in the novel after World War II, the lyric poetry that accompanied the New Criticism, the content of International Style in architecture, the growth of French impressionism, the changes in sonata and symphony form brought about by Beethoven's late works or the development of the classical style. Or do they? While all of these topics are intelligible on their own terms, the question is how sensible are they in such terms. What does it mean to inquire into topics such as these if, as in the case of intellectual history as practiced by Duxbury, Jay and Ross, to do so requires the continual abstraction of the products of human endeavor from the activities of humans at a particular time and place, as well as the details of the culture that makes up that particular time and place?

I cannot hope to answer this question about all of these various parts of high culture spanning half a dozen academic disciplines. Many of these parts of high culture have a literature

that might be taken as analogous to intellectual history and parts of each such literature are devoid of humans living and dying as well.⁵⁵ Thus, to answer this question for all of high culture would require that I evaluate these cognate literatures. I leave that task for other, more qualified and interested scholars. Instead, I shall attempt only to confront this question in the more narrow realm of intellectual history. So let me rephrase my question. Why has an entire genre of historical scholarship grown up that largely ignores the personal and social element in thought in a way that, on the whole, seems more difficult to do with respect to other aspects of North Atlantic high culture? What accounts for such a peculiar practice?

An easy way to get at just what is peculiar about the practice of much intellectual history is to recognize the odd status of proper names in its works. What would happen to Duxbury's story were we to scramble the names of his lawyers so that, for example, Alex Bickel wrote "The Problem of Social Cost," Richard Posner wrote the first casebook on contracts, Cristopher Columbus Langdell discovered psychology, not contracts, and so wrote "Law and the Modern Mind" and Jerome Frank wrote "The Least Dangerous Branch"? Would any part of the story have to be changed? Well, modern legal education would have started in Chicago and law and economics would have flowered at Yale, but beyond such shifts, I think that the answer is "Damn little." This is the free floating intellectual having floated free in a new sense.⁵⁶

Or consider Martin Jays' book. What would happen if some printer's devil would swap references to Jean Paul Sartre with those to Georges Battaile and vice versa? Or in Dorothy Ross' book if we move Albion Small to Columbia and Franklin Giddings to Chicago and trade all references to Francis Lieber and Thorstein Veblen? Or consider Morton Horwitz's book. Is there any reason *on the text* to believe that Charles Horton Cooley could not have written "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning"? Again, the answer in each case is "Damn little." Talk about the death of the author! The

55. See, e.g., J.R.R. Christie & Fred Orton, *Writing on the Text of a Life*, 11 ART HIST. 564 (1988) (discussing the plausibility of using biographical explanations to help understand works of art). Carol Zemel pointed me to this interesting article.

56. I cannot resist offering the following. "The names of authors or of doctrines here have no substantial value. They indicate neither identities nor causes. It would be frivolous to think that 'Descartes,' 'Leibniz,' 'Rousseau,' 'Hegel,' etc., are names of authors, of the authors of movements or displacements that we thus designate." JACQUES DERRIDA, OF GRAMMATOLOGY 99 (Gayatri Chakravorty Spivak trans., 1st ed. 1976). And to think, intellectual history was really the first post-modern discipline!

ability to mix up names in this fashion suggests that the fabled denouement of structuralism—the text writing itself—happened some time ago. So attenuated have the signifiers and signifieds become that, in principle, almost nothing would be lost by substituting other mammals for the humans.

Now, I do not want to suggest that we cannot learn anything from books such as these four. I, at least, have learned interesting and important things from each of them as well as from their siblings and cousins. But it is truly peculiar to have a literature about so intensely personal and human an activity as thinking and writing treat the individual humans doing that activity as of so little consequence in their particularity. Why are there no humans living and dying in this literature?

Whenever I ask this question in the presence of my good friend, Fred Konefsky, he says something to the effect that intellectual historians write this way because that is the way they were trained in graduate school. It is the world they inhabit, the culture that they are. There is, of course, something to be said for this explanation. Academic identities are tough things to break out of, formed as they are in those years, first in graduate school and then seeking tenure, when one is most vulnerable socially and economically and most open and excitable intellectually. And, I suppose that relatively new identities are harder to break out of than old.⁵⁷ Just what does this academic identity consist of? Where did it come from?

As the story has been told to me,⁵⁸ contemporary intellectual history is a fusion of two varieties of work. The first, with roots in the history of philosophy, is Arthur O. Lovejoy's history of ideas. A good understanding of what that was about can be found in Lovejoy's essay in the first issue of the journal of the same name.⁵⁹ It has always been assumed, Lovejoy began, that Man's "thoughts have at all times had a good deal to do with his behavior, his institutions, his material achievements in technology and the arts, and his fortunes."⁶⁰ It was thus the causal role

57. Here I should note a comment made by John Higham, one of the organizers of the Wingspread conference discussed below. When he tried to secure senior scholars to participate to the event, he met relative or absolute indifference. In contrast, "the younger intellectual historians" responded with "unbridled enthusiasm." John Higham, *Introduction*, in *NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY* xii-xiv (John Higham & Paul K. Conkin eds., 1977).

58. Though there are versions of this story in many places, I can find no single place where the story is told in detail. Dorothy Ross gave me the version of the story that I recount. That I may have garbled what she said should not be held against her.

59. Arthur O. Lovejoy, *Reflections on the History of Ideas*, 1 *J. HIST. IDEAS* 1 (1940).

60. *Id.*

of ideas in history that would be the central subject matter of the journal. But not all, only some ideas. "[I]deas derived from philosophical systems have had a wide, and sometimes a profound and decisive, influence upon the minds and the writings of the authors whose works . . . [historians of ideas] study . . ."⁶¹ The unfortunately low quality of histories of philosophy would, however, make it necessary for scholars in various fields to cooperate in producing studies for Lovejoy's new journal. These scholars would try "[t]o know, so far as may be known, the thoughts that have been widely held among men on matters of common human concernment, to determine how these thoughts have arisen, combined, interacted with, or, counteracted, one another, and how they have severally been related to the imagination and emotions and behavior of those who have held them"⁶²

Lovejoy saw the work of his journal as holding off, on the one side, the New Critics, oddly represented for him by C.S. Lewis, who asserted that nothing extrinsic to a work of art was relevant to the aesthetic experience of it, and on the other, seeming determinists, both psychologically oriented scholars, particularly Freudians, who emphasized the irrational sources of thought, and scholars devoted to Mannheim's sociology of knowledge, who asserted the dependency of thought on the social circumstances of its creation. To thus keep open a space for treating thought as an autonomous, but relevant topic for inquiry seemed vital to Lovejoy in 1940, because:

"[a]t no moment . . . in the life of the race has the pertinency of the Delphian imperative [know thyself] been more tragically apparent; for it must now be plain to everyone that the problem of human nature is the gravest and most fundamental of our problems, that the question which more than any others demands answer is the question, 'What's the matter with man?'"⁶³

The second variety of work that makes up contemporary intellectual history is exemplified by Merle Curti's, *The Growth of American Thought*.⁶⁴ While not the first of such books by any means,⁶⁵ Curti's approach stood in significant contrast to that of

61. *Id.* at 6.

62. *Id.* at 8.

63. *Id.* at 8-9.

64. MERLE CURTI, *THE GROWTH OF AMERICAN THOUGHT* xi (3d ed. 1964).

65. On the American side there was VERNON PARRINGTON, *MAIN CURRENTS IN AMERICAN THOUGHT* (1927). There were also two similar works of a larger scope, JAMES HARVEY ROBINSON, *THE MIND IN THE MAKING* (1921) & JOHN HERMAN RANDALL, JR., *THE MAKING OF THE MODERN MIND* (1926). Both of these works are in some ways closer to the work of

Lovejoy. Curti purported to offer a "social history of American thought."⁶⁶ He argued that:

[t]he history of knowledge, of speculation and ideas, and of values cannot easily be traced without reference to the institutions especially concerned with making accretions to knowledge and thought and disseminating these. Thus the growth in America of schools, colleges, libraries, the press, laboratories, foundations, and research centers becomes an important condition for the growth of American thought.⁶⁷

Further, recognizing that, "[t]he status of knowledge, the tissue of thought, the cluster of values are at any particular time affected by the physical environment and economy, polity, and social arrangements," Curti tried to show how the differences between the American and European environments meant that the Americans "adapted the European intellectual heritage their own way" and so how "American agencies of intellectual life came increasingly to differ from their European counterparts."⁶⁸

Though Curti's approach was different from Lovejoy's, indeed it was arguably an example of that determinism that Lovejoy was fighting off, the question that ultimately animated Curti—"the nature of American democracy and . . . American destiny"⁶⁹—was remarkably similar to Lovejoy's concern with "What's the matter with man?"⁷⁰ The similarity of concern was not, however, enough to cause Curti's enterprise to prosper. Writing twenty years later, Curti admitted that Lovejoy's approach, "one that systematically analyzed ideas in terms of their philosophical foundations, internal structures and interrelationships,"⁷¹ had turned out to be more popular.⁷² In some ways this fact is curious. Despite all of Curti's emphasis on the social history of ideas, a reader of his text would find lots of facts about the growth of American life and institutions and lots of names of individual intellectuals,⁷³ but could still quite easily play the

Lovejoy than Curti in that they are focused on ideas of the West generally. Randall was on the first board of editors of Lovejoy's journal.

66. CURTI, *supra* note 64, at xi (reproducing the original introduction).

67. *Id.* at x.

68. *Id.* at xi.

69. *Id.* at xvi.

70. Lovejoy, *supra* note 59, at 9.

71. CURTI, *supra* note 64, at vii (preface to the third edition).

72. That was the way I experienced the field when in college in the early sixties—before bellbottoms, when proper men's pants had, most curiously, a belt in the back. The history of ideas was everywhere; the social history of ideas, nowhere.

73. Dorothy Ross tells me that when she was in graduate school the book was colloquially known as "the telephone book."

game of switching around the names of thinkers that I played earlier. Social context—things like the growth of commerce or universities—was background; ideas were foreground; in between, connecting the two, there were no real people living and dying.

When lamenting the failure of his approach to thrive, Curti noted two significant developments in intellectual history. One was within the scholarly literature—the study of ideas, not through classic texts, but through myths and folklore, an approach that built on the classic work of Henry Nash Smith, *Virgin Land*; the other was without—"anti-intellectualism and the related problem of the status and role of intellectuals in American life."⁷⁴ This latter concern became even more significant when, in the mid-sixties, social history began to take off and eclipse the real cache that intellectual history had earlier enjoyed, whether written on the Lovejoy model or the Curti model. In addition to the resultant hand wringing in the bar at learned society meetings, a significant conference was devoted to trying to understand where intellectual history had gone wrong and to map out "New Directions" for the field.

Of course, the conclusions of this conference, known as the Wingspread Conference, for the lovely Frank Lloyd Wright house where it was held, were, not surprisingly, reassuring. That is the point of holding such conferences. Laurence Veysey opined that "[I]ntellectual history . . . has its own integrity. Its own defined possibilities are every bit as distinct as those of social history."⁷⁵ And, while emphasizing that intellectual history can be a mix of "social realities," "collective mentalities" and "formal systems of thought," the social realities seemed to be unusually abstracted from the daily life of humans and a concern with "the power of ideas' to control the lives and actions of men" seemed relatively obviously lurking in the background.⁷⁶

Gordon Wood's prescription for altering the sad state of affairs in which the intellectual historians found themselves emphasized an allegiance with Curti's project.⁷⁷ Woods noted that, "[I]t is increasingly evident that without the help of the social sciences in understanding thought and the way that it relates to social behavior we will never be able to persuade the rest of the profession of the significance of ideas and to keep intellectual

74. CURTI, *supra* note 64, at viii.

75. Laurence Veysey, *Intellectual History and the New Social History*, in *NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY*, *supra* note 52, at 19.

76. *Id.* at 10, 11.

77. This was to be expected since Curti was the guest of honor at the conference.

history in the center of things where we think it belongs."⁷⁸ "Only by rejecting the futile dichotomy of ideas or beliefs as causes or effects of social forces can intellectual historians escape from what will always be a losing struggle with the realists and the materialists."⁷⁹ Intellectual historians were to do this by recognizing that, "Ideas and symbols do not exist apart from some social reality out there. They are the means by which we perceive, understand, judge or manipulate that reality; they create it."⁸⁰ Thus, Wood urged intellectual historians to recognize that, "because ideas are important for what they do rather than for what they are, any idea or symbol that gives meaning to behavior and does something, whatever its nature or source and however irrational or silly it may seem in retrospect, has significance for intellectual historians."⁸¹ By looking at this wide range of materials, Wood, like Veysey and Lovejoy before him, hoped to establish that "ideas affect behavior."⁸²

An important positive program for giving content to the social context of ideas that Curti had tried to emphasize was forcefully offered by David Hollinger, who suggested that intellectual history was best understood as recreating the "discourse of intellectuals."⁸³ In turn, Thomas Bender suggested that Hollinger's discourse was best situated in specific times and places, particularly in cities before the middle of the Nineteenth Century and in disciplines or the university thereafter.⁸⁴ Still, Hollinger's examples made it clear that the discourse in question was to be assumed, not proven, and that discourse might take place between individuals who could in no sense be thought of as having discussed anything together, since they could have never met or corresponded, and might not even have lived at the same time. Similarly, Bender's more narrowly drawn notion of the site of discourse still encompassed generations of speakers and was, like Curti's earlier work, directed more to specifying the institutions that provided the matrix for discourse at any given time than to recreating the actual discussions of individu-

78. Gordon Wood, *Intellectual History and the Social Sciences*, in *NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY*, *supra* note 57, at 27.

79. *Id.* at 31-32.

80. *Id.* at 32. This recognition would come back to haunt the participants all too soon.

81. *Id.* at 34.

82. *Id.* at 35.

83. David A. Hollinger, *Historians and the Discourse of Intellectuals*, in *NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY*, *supra* note 57, at 42.

84. Thomas Bender, *The Cultures of Intellectual Life: The City and the Professions*, in *NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY*, *supra* note 57.

als at that given time and place. Thus, despite the real advance that Hollinger and Bender had made in providing an understanding of what intellectual history was about, neither seemed to do much to minimize the ease with which the names of their intellectuals could be swapped one for another.

In retrospect, the conference was a great success. The social historian barbarians were held at bay for a while by acknowledging the relevance of social context a bit more and, at the same time, a fusion of the two varieties of work—Lovejoy's and Curti's—was formally effected. Thus, for about the next ten years, intellectual history, more in the Curti than the Lovejoy mold, and led generally by the participants in Wingspread and their friends, experienced significant growth. But in the Eighties there came a new challenge that, though echoing Wood's recognition of the constitutive role of "ideas and symbols" and phrased in the latest French, post-modern fashion, seemed much like a counter-attack led by Lovejoy's ghost.

Soon after the Wingspread conference, a similar conference, this time entitled "The Future of Intellectual History," was held at Cornell. Here, the key question was asked by Martin Jay in a paper entitled, "Should Intellectual History Take a Linguistic Turn?", an echo of the title of a book of essays edited by Richard Rorty.⁸⁵ The answer to that question was obvious from the title. The general proposition offered by the participants at the conference was derived from the work of Ricoeur, Gadamer, Derrida and Foucault. They asserted that there was, in Derrida's words, "nothing outside the text,"⁸⁶ and that therefore the job of the historian was not to search for authorial intent, which was beyond the text and hence unknowable, but to interrogate the text through strategies of structural analysis and deconstruction, to examine texts standing alone. The point of this strategy for doing intellectual history was not to give up on the possibility of knowing a text, but "to gain access to the metalinguistic and metahistorical patterns of social intercourse and conflict . . . by suppressing or bypassing the (thinking, writing) subject, including the voice of authorial will."⁸⁷

Not surprisingly the advocates of this approach were, at least initially, modern European intellectual historians, the indi-

85. THE LINGUISTIC TURN: ESSAYS IN PHILOSOPHICAL METHOD (Richard Rorty ed., 1967).

86. DERRIDA, *supra* note 56, at 158.

87. Donald R. Kelley, *Horizons of Intellectual History: Retrospect, Circumspect, Prospect*, 48 J. HIST. IDEAS 143, 159 (1987).

viduals who were most directly exposed to these ideas.⁸⁸ With a little bit of imagination this return of focus to great texts could be seen as an attempt to reinvigorate the history of ideas after the devolution of Lovejoy's broad, interdisciplinary vision into an activity that "cut channels rather narrower and less venture-some" than those he had mapped out.⁸⁹ Nor did it escape notice that "the primary aim" of the favored methods of textual interpretation was "to shift the control over meaning from the original author to the theoretically better equipped interpreter," and that "the acquisition of such critical license (and authorial power)" was likely to "appeal to aspiring young intellectual historians."⁹⁰ Likewise, it was reasonably obvious that the vocation of the historical scholar was being augmented with a "more general vocation as cultural critic,"⁹¹ though whether this augmentation was a good idea was a text left uninterrogated.

While there were significant differences in the approaches of the various Cornell conferees, adopting either version of their semiological theory, whether the one that holds that language shapes experienced reality or the more thorough going one that holds that language constitutes experienced reality, seemed to undermine the more social history of ideas that the Wingspread conferees wished to follow, for either made problematic the relationship of text to context. The inevitable fight over these two approaches to intellectual history was focused by David Harlan. For Harlan, "recent developments in literary criticism and the philosophy of language" had "undermined belief in a stable and determinable past, denied the possibility of recovering authorial intention and challenged the plausibility of historical representation," with the result that situating texts in their context was "undoable."⁹² He contrasted the contextualist program centered around discourse, one that he admitted was "the dominant and . . . conventional orthodoxy," to the textualist program of the modern European historians.⁹³ For him the problems with defining the relevant network of discourse and with coping with the recognition that context was but another text to be interpreted

88. And so their conference proceedings came out as *MODERN EUROPEAN INTELLECTUAL HISTORY: REAPPRAISALS AND NEW PERSPECTIVES* (Dominick LaCapra & Stephen L. Kaplan eds., 1982).

89. Kelley, *supra* note 87, at 151.

90. *Id.* at 159.

91. John E. Toews, *Intellectual History After the Linguistic Turn: The Autonomy of Meaning and the Irreducibility of Experience*, 92 *AM. HIST. REV.* 879, 899-900 (1987).

92. David Harlan, *Intellectual History and the Return of Literature*, 94 *AM. HIST. REV.* 581 (1989).

93. *Id.* at 594.

were insuperable and thus only compounded the undesirable "tendency [of discourse-oriented historians] to reduce complex works to the status of documents."⁹⁴ For Harlan, when "discourse-oriented historians look at a particular text, they want to know how it functioned within a specific discourse."⁹⁵ Therefore, "their primary interest" was seen to lie "in the context rather than the text" and their "[i]nterest in the text" was accordingly "purely instrumental" and so objectionable because "complex texts" were "systematically diminished" by being "approached as something other than themselves."⁹⁶ In contrast, Harlan wished to suggest that, "rather than . . . groping backward toward some unreachable genesis," intellectual historians should encourage an approach that would "abandon the attempt to recover authorial intention" and so work toward "resituating" historical texts so that they "point forward, to the hidden possibilities of the present."⁹⁷ Thus, "a space might be cleared" within which a history could be written "concerned not with dead authors but with living books, . . . not with reconstructing the past but with providing the critical medium in which valuable works from the past might *survive* their past—might survive their past in order to tell us about our present."⁹⁸

David Hollinger's response to this attack on the contextualist program was remarkably restrained. He emphasized the implausibility of "dismissing . . . the entire project of studying ideas in their historical context" on the basis of "purely philosophical ideas" without examining the project's "monographic results."⁹⁹ And he argued that it was important "to enrich readings of particular texts" as well as "to illuminate a larger discourse in which . . . [complex texts] may have a part."¹⁰⁰ Nor was he against Harlan's wish to use such texts to illuminate the present. For Hollinger, work of this kind with complex texts was "ubiquitous" in the academy:

"[c]ontextualism went beyond . . . [such works] but without closing them off. The project of studying ideas in their historical context tried to liberate us, to whatever degree possible, from the constraints of the present. One major value of contextualism was the expansion of our perspectives

94. *Id.* at 595.

95. *Id.* at 595-96.

96. *Id.* at 596.

97. *Id.* at 604.

98. *Id.* at 609.

99. David A. Hollinger, *The Return of the Prodigal: The Persistence of Historical Knowing*, 94 AM. HIST. REV. 610, 614 (1989).

100. *Id.* at 617.

on texts, in order that we get more, not less, from these texts."¹⁰¹

Harlan's reply is of less importance than Hollinger's rather meek concession that he believed the way was open for many approaches to doing intellectual history. This concession may have been a recognition that, whatever intellectual historians may have said in public about the continuing vibrancy of their discipline, it nevertheless still was true that, as one of their number recently admitted, intellectual historians "have lost authority in relation to the dominant forms of social history."¹⁰² Nonetheless, however insecure some or all of the participants in this dispute were about their place in the academic universe, a matter about which I will have something to say later, that insecurity still should not have blinded everyone involved to a simple linguistic phenomenon.

In a world of paired concepts—text/context, authorial intent/interpreter meaning, language as autonomous/language as referential, etc.—each dependent for its meaning on the other, the denial of one of these concepts is not the equivalent of affirming that the other owns the field, but rather implies either that a different dichotomous structure of words is necessary to understand what is being talked about or that some other, single concept is similarly appropriate.¹⁰³ This is the double helix of language (and thus law),¹⁰⁴ paired words, each part of a chain of similar words, each chain gently but endlessly circling around the other, connected by the tension of opposition, but never touching; the loss of any word in one chain making its paired opposite useless in its separate chain, floating alone, intelligible only intransitively, reduced to being an entity knowable only mystically—"OM."

An excellent example could be constructed from Hollinger's helpful distinction between *The Knower and the Artificer*.¹⁰⁵ Hollinger distinguished literary, and some streams of philosophical, modernism both of which emphasized "making," the world of the artificer, from "cognitivism," encompassing scientific and other attempts to know experience and various streams of philosophi-

101. *Id.* at 618.

102. Fritz K. Ringer, *The Intellectual Field, Intellectual History and the Sociology of Knowledge*, in *THEORY, METHOD AND PRACTICE IN SOCIAL AND CULTURAL HISTORY* 106, 107 (Peter Karsten et al. eds., 1992).

103. The same holds true of assertions of the identity of the two elements of a dichotomy. To assert "law is politics" is of necessity to assert "politics is law," or better, it is to assert some third thing, for example that law and politics are "chicken soup!"

104. I have stolen this concept from Fred Konefsky.

105. David Hollinger, *The Knower and the Artificer*, 39 *AM. Q.* 37 (1987).

cal modernism both of which emphasized "finding," the world of the knower.¹⁰⁶ He then tried to show that these two attitudes subsisted side by side across Virginia Woolf's great divide,¹⁰⁷ even though the former emphasized strategies for generation of meaning and the latter, those of reference to meaning. But, if Hollinger's distinction is sensible, and I think that it is, to deny the plausibility of "knowing," as Harlan and the modern European intellectual historians seemed to do, was simultaneously to deny the plausibility of seeing the world in terms of "making" as well, for knowing is only intelligible in terms of its difference from making and vice versa. On its own philosophical terms the textualist challenge was empty.

No sooner had Harlan been dealt with than there came Peter Novick's book, *That Noble Dream*.¹⁰⁸ This enormous study, relying heavily on his examination of the private papers, as well as the published writings, of over one hundred years of American historians, tried to chronicle the ups and downs of the idea of historical objectivity, the ability of historical study to disclose "truth" about the past. Novick's conclusions were bound to raise hackles in the profession, for he argued that objectivity was a myth that was adhered to seldom, if ever; that political, and hence not objective, criteria always had been evident in the writing of history by Americans and so, that the concept of objectivity could easily be dispensed with; and that history as a discipline had fragmented to such an extent that there was no discipline left, no agreed on topic that one might be objective about in any sense less trivial than not lying about the existence and content of documents. Still, that the young intellectual historians, the backbone of the Wingspread conference, by no means a particular target of Novick's, should take up the cudgels against the book was a bit of a surprise.

First came a long review by James T. Kloppenberg in which he faulted Novick's book for the "intellectual history of the objectivity question that it does not provide," an absence that meant that the book did "not advance our understanding of the substantive issues concerning the question of objectivity itself."¹⁰⁹

106. *Id.* at 40-43.

107. Virginia Woolf, *Character in Fiction*, reprinted in 3 THE ESSAYS OF VIRGINIA WOOLF 421 (Andrew McNellie ed. 1988) (noting that "on or about December 1910 human character changed.").

108. PETER NOVICK, *THAT NOBLE DREAM: THE OBJECTIVITY QUESTION AND THE AMERICAN HISTORICAL PROFESSION* (1988).

109. James T. Kloppenberg, *Objectivity and Historicisms: A Century of American Historical Writing*, 94 AM. HIST. REV. 1011, 1015 (1989) (reviewing PETER NOVICK, *THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION*

What occasioned this observation was Novick's concluding chapter in which he looked at post-modern challenges to the notion of objectivity and noticed that there were few new ideas from the defenders of realist epistemology that were out there meeting the post-modern challenge. Kloppenberg asserted that such a conclusion, which he took to offer "a bleak assessment of history's prospects," was unwarranted because Novick had failed to examine more carefully the work of William James and John Dewey "who placed their confidence in free-floating communities of inquiry" whose results would "provide us with hypotheses, provisional syntheses, imaginative but warranted interpretations, which then provide the basis for continuing inquiry and experimentation."¹¹⁰ This was an "hermeneutics" that would bring history "[b]eyond the noble dream of scientific objectivity and the nightmare of complete relativism" and onto the "terrain of pragmatic truth."¹¹¹ This approach to history, "present in the best work of American historians since the first decade of the twentieth century," Kloppenberg labeled "pragmatic hermeneutics."¹¹² For him such an approach to historical understanding was supported by the recognition that "[o]ur convictions can be rooted in conventions rather than Truth and still have important consequences" and that the relevant convention was one that "acknowledges both the indispensability of the scientific method of verifying facts and the equally indispensable hermeneutic method of interpreting the meanings of the past we seek to explain."¹¹³

Next came Thomas L. Haskell, noted by Kloppenberg as one of the expositors of pragmatic hermeneutics, who objected strongly to Novick's identification of objectivity with political neutrality. Haskell believed in the importance of political commitment and found such commitment consistent with objectivity because for him objectivity was "the expression in intellectual affairs of the ascetic dimension of life."¹¹⁴ That dimension was said to enable historians "to do such things as abandon wishful thinking, assimilate bad news, discard pleasing interpretations that cannot pass elementary tests of evidence and logic, and most important of all, suspend or bracket one's own perception

(1988)).

110. *Id.* at 1026, 1030.

111. *Id.* at 1030.

112. *Id.* at 1018.

113. *Id.* at 1027, 1029.

114. Thomas L. Haskell, *Objectivity is Not Neutrality: Rhetoric vs. Practice in Peter Novick's That Noble Dream*, 29 *HIST. & THEORY* 129, 131-32 (1990) (book review).

long enough to enter sympathetically into the alien and possibly repugnant perspectives of rival thinkers,"¹¹⁵ in a word to exercise "detachment."¹¹⁶ Without detachment and the other "characterological values" associated with "the intellectual vocation," members of a scholarly community who were "unwilling to put intellectual values ahead of political ones" would "erase the only possible boundary between politically committed scholarship and propaganda and thereby rob the community of its principle justification for existence."¹¹⁷

Thereafter came David Hollinger, noted as the other of the expositors of pragmatic hermeneutics, who, at an American Historical Association forum, praised Novick's book as a work of intellectual history, though he found it "more usefully considered as a social and political history of the profession."¹¹⁸ For Hollinger, Novick's claim that, in Hollinger's words, "the ideal of objectivity, even in its most hermeneutically self conscious formulations, has been decisively refuted and what is needed is simply the Nietzschean courage to face the relativistic abyss" was a "misleading" understanding of the "current historiographical situation."¹¹⁹ And he contrasted Novick's practice, which was "attentive in the extreme to the standard professional norms," with his theory, which was that "the concept of objectivity was 'essentially confused.'"¹²⁰

Novick's response to these criticisms—I did not lament the current state of historical scholarship but think it is quite healthy; I wrote a traditional book because I thought that such would be most persuasive to historians—was notable for his assertion that he did not believe that the critics disagreed about his answer to the "objectivity question." Instead, he asserted that they disagreed with the nature of that question which the critics took to be methodological and he took to be ontological. "It goes not to the . . . issue of *how* we do our work, but to *who* we are, *what* we're doing and what we've done when we've done it."¹²¹ Whether he was right in this assessment is not clear, but it does seem significant that Dorothy Ross, in an extraordinarily trenchant commentary on the entire debate, found it "strange if

115. *Id.* at 132.

116. *Id.*

117. *Id.* at 151.

118. David A. Hollinger, *Postmodernist Theory and Wissenschaftliche Practice*, 96 AM. HIST. REV. 688 (1991).

119. *Id.* at 690.

120. *Id.* at 691.

121. Peter Novick, *My Correct Views on Everything*, 96 AMER. HIST. REV. 699, 700 (1991).

the 'historical sensibilities' of historians, as well as the way they 'frame their narrative or analysis,' their practice as it were, "were not affected" should the perspectivalist critique of objectivity, their theory as it were, be true.¹²²

Thereafter, Kloppenberg continued to advocate the pragmatic hermeneutics that he found in the work of Haskell and Hollinger, though with an increasing rhetorical pitch. Ultimately he tied his vision of pragmatism to Democracy, opined that "the community of historians is a paradigmatic example of a pragmatic community of inquiry" and linked such a community to the working out of democratic values. For Kloppenberg the debate over objectivism and relativism was important since "[i]t is crucial that we historians be able to distinguish what happened from what did not, and what was written from what was not, and our discursive community must test its propositions in the widest range of public forums," for without such an ability "we engage in shadow play, unable to distinguish experience from illusion."¹²³

That he and the other intellectual historians again failed to recognize that, as was the case with Hollinger's debate with Harlan, the demise of "objectivity" would not bring about the ascendancy of its opposite, be that "politics" or "propaganda" or "subjectivity," but, as Novick intimated, the demise of both, is less important than noticing the great stakes that were asserted to be at issue in an argument that Novick did not address to the intellectual historians in particular, but to the profession in general. Novick's attempt to demonstrate the impossibility of objectivity surely was as threatening to the political and social historians, if not more so. Yet, somehow for the intellectual historians the fate of the profession (and maybe even democracy) was tied up in the question of whether or not there was some way to recognize that humans work in situated spaces and at the same time to establish some mechanism or process whereby the results of historical inquiry could represent more than simply the fruits of one's perspective from that situated space.

While contemplating the question of why scholars such as Harlan so quickly attempted to pull intellectual history back from so small a nod in the direction of greater emphasis on context, or why anyone felt it necessary to build a methodological

122. Dorothy Ross, *Afterword*, 96 AM. HIST. REV. 704, 707 (1991). It is, of course, possible that one will never miss what one never had.

123. James T. Kloppenberg, *Pragmatism: An Old Name for Some New Ways of Thinking?*, 83 J. AM. HIST. 100, 136, 138 (1996).

shelter from the "death" of objectivity, it makes sense to look at something absent from the Wingspread conference, and noticed as such by one of the organizers—biography. John Higham remarked that a generation before "intellectual history flourished in partnership with biography," but that at the conference there had been displayed "a skepticism about the importance of individuals in history,"¹²⁴ this though two of the participants had recently published fine examples of the biographical genre.¹²⁵ The reason for this skepticism was the fact that the emphasis in social history on social aggregates of class and caste, when combined with the related emphasis on studying, not the materials of high culture, but rather the less exalted beliefs of such social aggregates, their *mentalities*, as the *Annales* school of French historians called them, made the work of individual thinkers of limited (causal?) importance and even raised the hoary specter of determinism. But aside from this narrow, time bound concern, despite whatever Higham said, biography has always had a difficult relationship with intellectual history. Biography had absolutely no place in Lovejoy's history of ideas. And, as my rendition of gossip details about the lives of my eight participants in the high culture of the North Atlantic was designed to show, biography's place in Curti's world, one that had more in common with the social historians than anyone at Wingspread seemed willing to admit,¹²⁶ is not all that obvious. Thus, the hybrid form, intellectual biography, might be seen as the tentative fusion of political biography, the ancient source of much political history, though now largely devolved to stars of Hollywood, TV and popular music, and intellectual history.

Still, whatever its origin, intellectual biography, the biography of intellectuals with the gossip taken out, is no mule. It is a vital form. Two recent examples merit note and simultaneously

124. John Higham, *Introduction*, in *NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY*, *supra* note 57, at xi, xvii.

125. DAVID A. HOLLINGER, MORRIS R. COHEN AND THE SCIENTIFIC IDEAL (1975); DOROTHY ROSS, G. STANLEY HALL: THE PSYCHOLOGIST AS PROPHET (1972).

126. In retrospect, the rise of social history was less evidence of a weakness in intellectual history, as it seems to have been taken by the Wingspread conferees, than a recognition of both the leftward lurch of the academy in the Sixties and the opening of positions in history to women and minorities in those same years. The rest of the noise was fad—quantitative methods—and fancy-*Annales* history. The best evidence for this interpretation seems to me to be squarely within intellectual history itself. In 1968 historians knew as little about the lives of intellectuals (or bankers, for that matter) as they did about homemakers and bootmakers. Were social history really about social aggregates of *any kind*, intellectuals (and bankers) would have been just as good objects for study. Indeed, they would have been much more attractive objects for study, since they left more easily accessible written records.

can focus on the oddity of the hybrid. Robert B. Westbrook's *John Dewey and American Democracy*¹²⁷ patiently examines Dewey's early years for an understanding of the way that his early Hegelianism turned into his later pragmatics and provides a much needed focus on Dewey's continuing concern with democracy, a concern that survived, indeed increased, after the famous dispute with Randolph Bourne over the American entry into the First World War. Yet, there is a real sense in the book that, after Dewey is married and firmly settled into an academic position, his actual surroundings are not very important to the story, this though, as Bender points out, the university was well on its way to becoming the center of intellectual life by the time Dewey began teaching at Chicago and though both Chicago and Columbia, not to mention The New School for Social Research, were quite distinct intellectual enclaves. Now, it may be that Dewey was in fact less tied to his universities than to the reform communities around him in both Chicago and New York. On Westbrook's text one could make that argument. But the concreteness of either situs for Dewey's life is simply not there. His ideas constantly float free of his moorings. James Miller's *The Passion of Michel Foucault*¹²⁸ presents a thinker whose work is much more difficult than Dewey's. Not surprisingly Miller devotes a remarkable amount of space simply to making sense of texts. To my way of thinking he succeeds in this endeavor about as well as can be expected. What is more remarkable is how well Miller succeeds in making apparent the concrete circumstances that accompanied the writing of several of Foucault's major texts. In addition, in Miller's work there is a strong sense of time and place, of the more general situation that surrounded Foucault both in the university and in left political culture. Though there is no sense of the daily activities of Foucault, episodically his activities come clear. People actually sit down to have conversations. Lovers come and go. Paris is gray; California is sunny and bright. Arcane political maneuvers are made sensible and in particular the politics of the French university system and of academics involved in national politics are made tolerably comprehensible. But the most amazing thing about the book is Miller's success in linking Foucault's participation in sado-masochistic sexual practices and his delight in the gay bathhouse scene in San Francisco, a scene that contrasted so markedly with that of his own Paris, to both Foucault's death

127. ROBERT B. WESTBROOK, *JOHN DEWEY AND AMERICAN DEMOCRACY* (1991).

128. JAMES MILLER, *THE PASSION OF MICHEL FOUCAULT* (1993).

from AIDS and to his philosophical emphasis on the "limit-experience."¹²⁹

While Miller's work is, I think, better than Westbrook's because of the sense of concreteness to Foucault's life that is lacking in Dewey's, still, there is something peculiar about both books. It is the sense of the Viennese torte to even these, among the best of intellectual biographies, of layers of life and writing, life and writing, life and writing . . . assembled like cake then butter cream, cake then butter cream, cake then butter cream . . . Such is the formal manifestation of the disjuncture between life and work.¹³⁰

Now, of course, there is always the possibility that, had the Viennese torte form been pointed out to Westbrook or Miller, each would have asserted that there was a significant disjuncture between the life and writings of their respective subjects. But, it is the failure of both authors to address the question of the relationship of daily life to thinking and writing that is most significant. Even for Miller, it seems that if Foucault's activities do not directly illuminate his writings, then they can be skimmed on. In this genre, works may, as in the case of Foucault, illuminate difficult parts of a thinker's life and may even act in a kind of symbiosis with that life, but it is still a life of the mind that is written, not a life that simultaneously, and perhaps on a daily basis, has trouble with landlords, department chairs or publishers or with lovers, friends or children. Even in this hybrid form, the assumptions that make up the disciplinary norm somehow shine through: Ideas on their own terms are causative agents in history. This central norm underlies intellectual history and can be traced all the way back to Lovejoy.

All this having been said at length about where a particular academic identity comes from and what it consists of, Konefsky's proposition, "Stop this nonsense, Schlegel. Just accept that intel-

129. I strongly prefer Miller's work to DAVID MACEY, *THE LIVES OF MICHEL FOUCAULT: A BIOGRAPHY* (1993). While Macey's work gives a far more detailed, though remarkably gossip-free, presentation of Foucault's life and in general gives brief, clear presentations of his work, it is a pelting downpour of names, places, activities, political and academic factions and the like. Little attempt is made to disclose pattern and almost none to the explanation of social practices and institutions. This criticism ought to make reasonably clear a point that is often missed by my readers. While I am attempting to identify an absence in intellectual history, that absence cannot be addressed simply by multiplying detail as Macey has done.

130. I found the same problem when trying to lay out the early work of Walter Wheeler Cook and Underhill Moore; it was perhaps even more obvious then because the available biographical material was so much more sparse.

lectual historians write this way because it is the way that they were taught. It is who they are," is, I think, unsatisfactory. Granted disciplinary structures are strong and academics are sheep. In any endeavor there always is the push of the party line, of patron and discipline. Still, the "why" question remains, "Why does practice in the discipline continue in this particular way?" What is there about the identity of the scholars in the discipline, of those who live it, that makes that identity, that definition of what is "proper work," so tenacious?

After all, disciplines do change. Geniuses appear. Mozart altered forever the way opera was conceived. Beethoven surely changed the way that the sonata was thought about. Manet may have made the decisive break from French academic painting. Wright liberated home design in ways that are still being felt. Auden and Genet made far less of an impact on literature, but Eliot and Joyce surely made up for the difference in an earlier generation. Heisenberg and Schrödinger simply transformed the way physics is thought about. Doubtless, neither Dewey nor Foucault will be spoken of in the same tones as Plato and Kant by our grandchildren, but, with some work in the next several generations, the former may be seen to have given us a better way to understand the relationship between knowledge and democracy and the latter, to have helped us to see the way that patterns of thought limit our thinking. What is it, other than the pull of normal science, that places Hollinger and Bender's emphasis on looking at discourse in a concrete context at the border of thinking about their discipline and not at the core, or even the trailing edge? If some graduate advisor at, say, Harvard, Yale, Hopkins or Berkeley said to the new crop of graduate students in intellectual history, "Before you write a word you need to know everything about the lives of each of the major characters whose work you will explore on any topic you decide to write on!" though trumpets might sound, no walls would fall.

One conceivable explanation for contemporary practice in intellectual history, one answer to the "why" question, would center on relevance, a question of the fit of any text with a suggested context.¹³¹ It might be argued, following Hollinger and Bender's emphasis on disciplinary communities, that the context most relevant and helpful to understanding the products of intellection is the normal science in the discipline or area in which

131. Robert Gordon suggested this argument to me.

a text can most comfortably be situated.¹³² As a precept directing research this assertion of relevance might be reduced to, "First look at the bends and twists and turns in the field for an understanding of what any piece of work in it might mean. It is most likely to fit well in that context." But relevance is an empirical concept. In this context it asks, "What evidence might illuminate the text in question?" The assertion that other texts in the field best illuminate a particular text may be true in any given case, or even in a class of cases. But to establish that factual proposition at least one would have to give evidence of having examined other possible sources of illumination, that is unless the assertion works like an evidentiary presumption, either by rendering evidence to the contrary irrelevant and so conclusively determining the fact or by requiring that opponents first produce evidence to counter the assumption before the proponent may be asked to defend it. If it is the former kind of presumption, then relevance is clearly not an issue; the presumption is simply a disciplinary norm that is unquestionable, a preference for where and how to work and we are back to Konefsky's observation. If it is the latter kind of presumption, then it needs to be supported by some evidence that repeated evaluation of contexts other than the disciplinary matrix has produced limited results. But it is that evidence that is lacking in intellectual history as commonly practiced. Venturing far and wide over living and dying in an attempt to illuminate texts and the cultures in which they are found is just what is absent from current practice. Thus, I rather doubt that relevance is what drives that practice.

Another possible explanation for the current practice in intellectual history, of which Duxbury's book is but an example, can be captured by considering the notion that Dorothy Ross suggested to me—all of the subject matters I have talked about

132. This is essentially the argument made by Quentin Skinner. See *MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS* (James Tulle ed., 1988). His argument that texts are only intelligible when situated in such an historical context has brought down on him the wrath of political theorists whose discipline often functions by commenting on classic texts used for their formal relevance to the contemporary problem being discussed. This is, of course, an argument about nothing. There is no reason why a text cannot be read in any number of ways, for any number of purposes. Recovery of meaning at a time past is only one of those possibilities and doing so hardly impugns the activity of creating political theory if it is useful for it to proceed in some other way.

At the same time it should be noted that it is surprising how often I read work that is presented as a comment on past ideas or about present ideas about the past that on reflection seems more accurately to be described as social, political or cultural theory in disguise.

are parts of North Atlantic high culture. Why would one treat participants in such diverse, yet similar enterprises so differently? The first and most obvious difference is in the medium in which production of high culture takes place. Music and art have limited, and in most cases no, verbal content; that is the reason for the awful, metaphoric language that is used when they are discussed. Literature has for some reason been taken as also offering up its meaning with difficulty, a fact that may explain why of late literary criticism is as thickly impenetrable as are art and music criticism. Modern physics is mathematics, a language that is anything but verbal. In contrast, the intellectual, as well as whomever is the speaker of the content of any of the mentalities that one might study, works only with words. And words, as we all know, are transparent. They need no context to make their meaning clear as do art and music, literature and physics.

But, of course, the assertion of transparency is quite odd. On one side, much of intellectual history is taken up with the explication of complicated texts; in such circumstances, any assertion of transparency would also silently suggest that much of that explication is light lifting, an avoidance of the hard work done by scholars working to explicate the products of other parts of high culture. On the other side, on the textualist theory of meaning, only language can make language "clear," if clear is the right word, since all meaning is created by the relationships between words. Thus, a reference to facts "external" to the text—biography, history, politics economics, etc.—only complicates understanding for it just adds texts to the existing stew and those texts too need understanding. On such a view, of course, it is the practices in other fields that are troubling, not the practices in intellectual history. But as a justification for current practice, this argument from the post-modern view of language is a bit post hoc for a discipline that was engaging in these practices a good while before the relevant theory ever surfaced and parts of which are fighting post-modernism tooth and nail.

A more historical defense of present practices in intellectual history would be the adoption of a textualist-like position, but based on a purported tie to the "New Critics" in American literature who likewise radically limited the material for explaining literature to the work itself. More plausible, that is, except for the fact that it is precisely this view of literature that Lovejoy objected to at a time when the New Critics were in their ascendancy, and the practice of Lovejoy and his disciples is surely the

most acontextual of all the branches of intellectual history.¹³³

More importantly, after thirty years of literary criticism and Wittgensteinian philosophy the assertion that language is transparent is preposterous. And, I have a hard time believing that intellectual historians as a group are unaware of the challenges to the notion of the transparency of language made during these same thirty years. Of all historians, intellectual historians seem most to have read and pondered these theories and, at least at the verbal level, to have internalized them. Thus, however easy it may be to ascribe the usual practices for treating texts in intellectual history to a notion about the transparency of language, I think that such an explanation is likely to be wrong.

An alternative explanation, an alternative "why," offered by some of my feminist friends seems more promising. A contextualized ratiocination is male; richly contextualized understandings are female. It's back to Jake and Amy. I do think there is some explanatory force to this criticism, especially given the distribution of female historians between social and intellectual history. But, at the same time, I do not wish to do more than mention the point, and not particularly because it has the personally odd result of fracturing sex and gender for both Dorothy Ross and myself. While gendered understandings may have had something to do with early practice, this is not the important question. Just as is the case with the transparency of language, I find it hard to believe that intellectual historians as a class are unaware that their practices could be described as having a gendered basis. Only an hermetically sealed academic would not have made the connection, at least briefly. No, again, what seems to be more important is the persistence of practices over time, the sense that criticism based on gendered norms is somehow irrelevant to what is driving current disciplinary practice.

I suppose that explanations other than training, transparency and gender are possible as well. For example, the personal demands of scholarship may play a part. Although one ought never to discount the young historians *macho*,¹³⁴ the redemptive power of "With No. 2 pencil and Xerox machine through darkest Archives," at the same time one should remember that it is easier to exercise a practice that allows one to take

133. It should be noted that of late has come a movement in literary studies that purports to resituate works of literature in their historical context. See JEREMY HAWTHORNE, *CUNNING PASSAGES: NEW HISTORICISM, CULTURAL MATERIALISM AND MARXISM IN THE CONTEMPORARY LITERARY DEBATE* (1996); *NEW HISTORICAL LITERARY STUDY: ESSAYS ON REPRODUCING TEXTS, REPRESENTING HISTORY* (Jeffrey N. Cox et al. eds., 1993).

134. Laura Kalman acquainted me with this delightful concept.

all ones research materials home to the quiet of ones study than to have to slog away with ones research under the dubious eye of some suspicious archivist who works only normal business hours or worse, to spend ones evenings in unattractive motels in the pursuit of interviewees who have had the bad judgment not to locate themselves all in one place, and that redemption might come from wrestling with a large pile of dusty, obscure Seventeenth Century political tracts. Moreover, there is a hidden advantage occasioned by the usual practice once it is recognized that sociologists and anthropologists are remarkably loathe to go back into the field a second time; instead they tend to my field notes for a longer time than is probably sensible. One is seldom too old to take out a few books from the library and try to make sense of them. Thus the disciplinary norm may be reinforced by the comfortable pattern of work that it permits.

While all of these explanations for current practice in intellectual history have some force, still, I think that it is possible to identify an even more satisfactory explanation of that practice by asking the question, "Where is the hero in most intellectual history?" "Hero?" comes the reply. "There is no hero. Intellectual history is neither a narrative enterprise nor a piece of traditional fiction!" Here, at the most preposterous assertion of all, I must beg to differ. While it is true that the hero in intellectual history is absent, is nowhere to be found, his, and I use that word carefully, absence is as powerfully felt as the absent mother upstairs in *Long Days Journey into Night*, the Godot who never comes or Kilroy who always *was*, but never *is*, here. The absent hero is the intellectual as a type and derivatively, the university intellectual. And so, the implicit assertion of the causal efficacy of thought standing alone, of reason, the formal product of intellection, of intellectuals, is the social justification for the activities of the species of academics of which the creators of these works of intellectual history are exemplars.

Consider. When was the last time that you read a book or article in the field where the exercise of reason was portrayed as a bad thing? Of course, from time to time reason may yield false, even pernicious results and intellectual historians do not fail to examine such occurrences. Indeed, it might be that an exhaustive evaluation of the relevant literature of the past ten years would show that intellectual historians prefer to examine circumstances where reason has not lived up to its demonstrative potential. But that is just the point. Who points out the failures of reason? Either an intellectual or an intellectual historian! And you say that there is no hero.

I think that it is no mere coincidence that recognizable forms of the discipline first appear in the Twenties and grow in number in the Forties and Fifties. By the Twenties, the modern university was about fully formed and the ascent of the sciences to their place of dominance in the university was visible, if only through the example of the drive toward a more rigorous empiricism in the social sciences, areas that had previously been more fully the province of reason and not counting. By the Forties and Fifties the social sciences were lost ground and even worse, it was arguable that reason's dark night had brought the twin evils of fascism and communism, the horror of the former only then sinking into our consciousness, the horror of the latter, whipped up where it was not already apparent. Ideas had consequences as even the blind could see.

That ideas had consequences was, of course, their saving grace, at least for a group that, perhaps it is not too strong to say, felt itself under attack on the one side from the growth of science and on the other by the growth of that anti-intellectualism in American life that Curti felt it necessary to remark on, not to mention the continuing insecurity that, despite Lovejoy's strong assertion that ideas were a causal force in history, he just might not be right. After all, Lovejoy's assertion was made in response to various determinisms, Marxist or not, that seemed to deny the causative efficacy of ideas. But here, of course, the important point was that to suggest determinism was to deny the importance of the intellectual as a type. Why else care?

Intellectual historians care about the causative force of ideas in history for the same reason that other groups care when their activities are attacked. Thus, when the Philistine's in Congress attacked the NEA, the artists came back, not just with cries of censorship, but also with assertions of the importance of art for the culture of all Americans. Similarly, when music instruction in the public schools is threatened with termination, the music world in any little or big community comes out in force with the assertions about the importance of music in American life. And, when the Superconducting Supercollider was threatened, the particle physicists came out *en masse*. Responses such as these are at least as much a recognition of the presence of a threat to the sense of the significance of what these individuals do, to their feeling of worth, as they are a recognition of a threat to these individuals' pocket books. To cut back on the NEA or on music or on big physics is to suggest that these disciplines are not very important to life in America, that it is no big deal to be an artist, a musician or a physicist.

And to suggest that ideas lack causative force in history, that texts can never be situated in their historical context, that objectivity is a snare and a delusion, is to suggest that it is not very important to be an intellectual historian and derivatively, an intellectual. Such a conclusion truly opens a Nietzschean abyss.

So, all of those now seemingly pointless references to causality, carried down as late as Thomas Haskell's concern about the determinist implications of social history for intellectual history expressed at the Wingspread Conference,¹³⁵ all of the strife during the Eighties over textualism and contextualism, all the concern with objectivity were not all that pointless. Intellectual history, "the history of what intellectuals have said about issues that historians regard as important,"¹³⁶ establishes the importance of what we as intellectuals, and in my experience intellectual historians are intellectuals par excellence, do each day and so our place in the world as intellectuals was at stake. Novick was thus both right in his assessment of his disagreement with his opponents and wrong. He was right that the issue was ontological, about what it is to be both an intellectual historian and an intellectual. But he was wrong in not understanding that it is very hard to face such ontological issues directly and so that to pose the issue as a methodological one was more tractable, less threatening, more capable of generating an acceptable middle way out of ones problems such as "pragmatics hermeneutics," less likely to cause a crisis in a field that, justifiably or not, already felt itself to be vulnerable.

Reflect for a moment on Thomas Bender's assertion that he writes to document the public role of the intellectual in American life.¹³⁷ I do not doubt him for a minute. Kloppenberg's concern to establish a method that would assure that "our conventions can . . . still have important consequences" and Haskell's worry that abandoning objectivity would "rob the community of [intellectuals] of its principle justification for existence," as well as Kloppenberg's later attempt to tie "the community of historians" to the "pragmatic community of inquiry" that he took to be

135. Thomas Haskell, *Determinist Implication of Intellectual History*, in *NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY*, *supra* note 57, at 132.

136. David Hollinger, *What is Intellectual History?*, 35 *HIST. TODAY*, Oct. 1985, at 49.

137. See Thomas Bender, *Academic Knowledge and Political Democracy in the Age of the University*, in *INTELLECT AND PUBLIC LIFE* 127 (1983). See also *The Cultures of Intellectual Life: The City and the Professions*, *supra*, at 3. The result of Bender's desire is *NEW YORK INTELLECT, A HISTORY OF INTELLECTUAL LIFE IN NEW YORK CITY, FROM 1750 TO THE BEGINNINGS OF OUR OWN TIME* (1987).

at the root of democratic values, are similarly evidence of attempts to shore up the public role of the intellectual.¹³⁸ Nonetheless, the implicit assertion that such a public role continues to exist is quite dumbfounding. Whatever may be the case in France, a matter that I am still not convinced about, all of Bender's research patiently, indeed lovingly, chronicles the death of those institutions that supported the public culture of the intellectual. Every reading club that died, every little magazine that folded, every journal of opinion that is no longer with us, every newspaper that has turned closer to the tabloid form is just further evidence that the life of the mind in America has withdrawn into the academy and there, all but pulled up the drawbridges. Notice the reaction made inside the castle when a Carl Sagan or a Stephen Jay Gould, an Alan Dershowitz or a Lawrence Tribe seems to participate in public life. How quickly come the negative words—mere popularizer, filthy lucre. The insecurity behind such often deserved appellations is palpable.

As historians, we ought to expect that this would be the reaction of intellectuals to the shift from a dominant elite to a dominant popular culture, one of the unforeseen "consequences" of our celebration of democracy. Surely, the notion that the promise of *Emilie* will be fulfilled on any great scale is no longer plausible. But predicting the decline of the relative social importance of one's caste is not the same thing as accepting the decline of one's craft. The presence of the absent hero protests the decline of the former quite eloquently, but it also points to the existence of an insecurity brought by the latter—the insecurity of professional role.

I suppose that someone outside of an history department can be forgiven for mentioning that the most peculiar aspect of the historiography of intellectual history is the obvious professional insecurity squirreled away in all of its corners. Lovejoy and Curti showed no such insecurity at the start, but by the time of the Wingspread conference it was there for any careful reader to see. John Higham directly acknowledged a "loss of momentum" in intellectual history,¹³⁹ Laurence Veysey, who emphasized the separate "integrity" of the field¹⁴⁰ and Gordon Wood who emphasized the need to keep intellectual history "in the center of things," instead buried their worries in their affirmations.¹⁴¹ Kloppenberg's concern to present a "moderate histori-

138. Kloppenberg, *supra* note 109, at 1027; Haskell, *supra* note 114, at 151.

139. Higham, *supra* note 124, at xiii.

140. Veysey, *supra* note 75, at 19.

141. Wood, *supra* note 78, at 31-32.

cism"¹⁴² seems similarly calculated to put a good face on a tough situation, while Haskell's claim that the resolution of the objectivity question entails "cultural ramifications" that are "incalculably wide"¹⁴³ more obviously expresses perceived peril. The sense of a field under siege can likewise be found in such comments such as, "[t]he tides of psychological and sociological reductionism seem to have been dammed and turned back. The history of meaning has successfully asserted the reality and autonomy of its object. At the same time, however, a new form of reductionism has become evident, . . ."¹⁴⁴ and "[i]f, as I Believe, the clarification of belief systems . . . is the true task of the human and social sciences, then a certain kind of intellectual history continues to have a place in our discipline."¹⁴⁵ Though the project of the Cornell conferees was offered in strident tones, those tones would have been unnecessary had there not been the underlying sense that the program they offered was necessary for the field to remain viable; even David Harlan seemed to be pleading for some space in which to be left alone when he suggested that "context-oriented historians should stop chastising their colleagues for 'presentism' and acknowledge the value—if not the necessity—of letting the present interrogate the past."¹⁴⁶ For all of these individuals there seemed to be a real risk that the products of Paris apartments and American college offices would not warm Duxbury's people but rather would be cast out onto a rocky, desolate, darkling plain.

While David Hollinger may be right when he asserts "intellectual history's unique vulnerability to . . . epistemological crisis,"¹⁴⁷ still the genesis of all of this professional angst is not all that obvious. As Hollinger made clear to Harlan, by rights, the social (and political) historians should suffer from the same epistemological problems as were asserted to plague the intellectual historians; they don't seem to be worried. Good books of intellectual history get published and I assume that graduate students still appear at the doors of well placed mentors. Thus, the

142. Kloppenberg, *supra* note 109, at 1029.

143. Haskell, *supra* note 114, at 142.

144. John E. Toews, *Intellectual History After the Linguistic Turn: The Autonomy of Meaning and the Irreducibility of Experience*, 92 AM. HIST. REV. 886, 906 (1987).

145. Fritz K. Ringer, *The Intellectual Field, Intellectual History and the Sociology of Knowledge*, in *THEORY, METHOD AND PRACTICE IN SOCIAL AND CULTURAL HISTORY* 106, 113 (Peter Kersten et al. eds., 1992).

146. David Harlan, *Intellectual History and the Return of Literature*, 94 AM. HIST. REV. 581, 608 (1989).

147. David Hollinger, *The Return of the Prodigal: The Persistence of Historical Knowing*, 94 AM. HIST. REV. 610, 611 (1989).

special vulnerability of the field seems to me to hide more than a little worry about the plausibility of the enterprise quite apart from its relative decline in cache.

It should not be forgotten that intellectual history was hottest in the decades dominated by the fabled "end of ideology" and Parsonian sociology. The presentation of ideas favored in the field, the ability to scramble proper names and yet keep the argumentative thread, is at least homologous with the abstracted understanding of political and social life dominant at that time. Today, when in contrast no detail of human or social life can be safely walled off from the intrusive glare of "meaning," it is much harder to hide the hero of intellectual history than once was the case when all of social life was hidden too. Still, to try to hide the hero may be a quite plausible strategy for a group that on one hand is threatened with a reduction of the importance of its work to matters of time, class, caste, and gender, and on the other, with a Faustian bargain that preserves the autonomous place of thought, but at the price of radically reducing human agency, except possibly at the point when paradigms or *epistimes* inexplicably shift. Better that the hero be hidden in this time when the ethical interrogation of all aspects of an intellectual's life is acceptable scholarly behavior, for were he not hidden, someone might discover that, as Paul Johnson's amusing book¹⁴⁸ seems to be trying to tell us, important thinking can be done by less than savory people. With such knowledge someone might then question why anyone would care what such less than admirable persons had to say.

Thus, I do not wish these remarks to be read as saying that hiding the hero of intellectual history is an unreservedly bad thing. It may be a plausible strategy for allowing the life of the mind to survive in hard times. At worst, it is an almost amusing example of self-effacement and in this "in your face" society, more of such examples would be welcome. Still, by effacing the hero, by suppressing the details of the activity of thinking and writing that intellectual historians must know from their own lives is an intensely, particularistically personal one, they set up an unrealistic, indeed bizarre, standard for us to meet when it comes to living the life of an intellectual in these same hard times. To champion, as most of us do, the decline, though maybe that word is no longer correct, of hereditary wealth, of the *rentier* class, and the democratization of life for at least a middle class of some proportions in the face of a greatly expanded and

148. INTELLECTUALS (1988).

expanding population unfortunately entails a continuing bureaucratization of life. And it did not start yesterday. It began over one hundred years ago with the growth of the university as it swelled to accommodate the children of the expanding middle class. It is time that intellectual historians recognize this shift and so begin to explain in some detail the social conditions under which the work of its heroes was done, lest we forget that Locke never signed time sheets and that Henry Adams accepted employment only when he wanted to.¹⁴⁹

The free floating intellectual of the Nineteenth Century whose existence was subsidized by investments in someone else's labor or by rental payments and whose clubs and proper journals provided an outlet for his thought is dead.¹⁵⁰ The minister who could contribute to the discussion of the place of grace in God's plan for salvation is gone. The University teacher who kept his few upper class boys in line and taught them some greek and latin while working on another, more important topic has disappeared.

In their place have come many types. There is the willing captive of the ideological think tank, a recreation of the court philosopher of the Seventeenth and Eighteenth centuries. The free floating intellectual makes ends meet by doing editing or waiting tables or working in a deadeningly awful, largely clerical position in some gross organization or other. The minister has women's group on Tuesday, men's group on Wednesday, Trustee's meeting on Thursday at the same time as choir practice, youth group on Friday and synod business on Saturday. The University teacher has not just the young to teach, but department meetings, university committee meetings, manuscripts

149. Both Robert Gordon and Laura Kalman have cautioned me about this and the following three paragraphs. They suggest that the contemporary American academic has a far cushier existence than did the Seventeenth and Eighteenth Century intellectual dependent on patronage or the Nineteenth Century intellectual in academic employment. They may be right, though the travails of the European musician once aristocratic patronage disappeared might suggest to the contrary, as does the decline of the servant class and of unfettered spousal household labor among the middle class in the Nineteenth and early Twentieth centuries. These two matters aside, I ultimately stick to my guns for two reasons. First, I believe that I have accurately described how life is experienced by the contemporary American academic intellectual. Second, if I am in fact wrong, then the pattern of work in intellectual history is truly ridiculous. For a group of historians to ignore the superior continuity of their current estate to that of times past and instead to postulate as an ideal, a hero, the kantian intellectual independent of time and place, is to expose an uncertainty about the value of the products of intellection that even I hesitate to attribute to academics.

150. To see this phenomenon one could look in the cracks of STEVEN BIEL, *INDEPENDENT INTELLECTUALS IN THE UNITED STATES* (1992).

to comment on for editors of learned journals or disciplinary book series, thesis committees to serve on, graduate students and new faculty to mentor and union affairs to attend to.

Nor is the infrastructure that made the life of the mind easy, even in the early Twentieth Century, anywhere to be found in the modern household. Servants are gone. Housekeepers are gone. Full-time homemakers are gone. In their place have come scouts, ballet lessons, tennis lessons, after school nights, little league practice, soccer practice, social science dioramas, trips to the library to get materials for school papers and, let us not forget, quality time. Then there is the cooking, the cleaning, the washing, the gardening and home repairs, the arguing about who doesn't do their share and the awful fact that it takes two academic incomes to pay for a house and send the kid to anywhere but old State U.¹⁵¹

Given these conditions, why we flagellate ourselves over failing to measure up to the achievements of scholars in the late Nineteenth and the first half of the Twentieth Century and so constantly lament about how awful life in the University has become is beyond me. It would be more plausible for each of us to put on our door a knock off from the old western sign—Don't kill the intellectual, s/he is only trying—for the most extraordinary fact about the life of the mind in American is that under these circumstances it exists at all! The details of the lives of intellectuals need to be celebrated, not suppressed. Less insecurity, less worry about the causative role of ideas in history and more wonder that ideas have been produced at all is what is in order.

Now what does any of this have to do with Duxbury's book? In one sense, nothing, for on its terms it is a fine book. Indeed, its method of presentation fits well with the discipline it wishes to portray. Law has for its core ideology the notion that it is to be understood on its own terms as a body of rules divorced from the humans who make the rules—a government of laws not men—and to be criticized in terms of its own understanding of human life and values. Indeed, this ideology is so strong that the whole of law and jurisprudence in America for the last, oh say, 130 years could be rendered as a continuing struggle on the part of a small group of dissenters from this view to make a lot of noise in an attempt to draw attention to their dissents. Given

151. Less savory is the griping that is occasionally heard about how single individuals and individuals in a hetero or homosexual relationship without children have more money to pay for household help and more time available for scholarship.

this ideology and its fit with the methods of intellectual history generally, Duxbury's book is unexceptionable.

In another sense however, because it too has its heroes off stage, *Patterns of American Jurisprudence* is missing much of the story that should accompany and inform the jurisprudential thought that it wishes to present. Surely it is of some significance that Coase experienced the growth of English socialism, that Langdell was an appellate brief writer, that Frank was a practicing lawyer with an over-active adrenal gland and that Bickel was a Jewish immigrant taken under wing by another Jewish immigrant.¹⁵² Each of these individual's work, while deeply intellectual, was also deeply personal. I know that mine is. I have no doubt that I would have reacted quite differently to law and thus have written quite differently had I not both grown up and attended law school in Chicago and as a result experienced the cognitive dissonance of finding myself being taught that law was separate from politics in a town where daily (and Daley) the papers were full of evidence of the inextricable admixture of the two. I similarly doubt that I would ever have become involved in Critical Legal Studies had Robert Gordon not known Duncan Kennedy and so seen to it that I attended the first CLS meeting. So, here are some things, but only those things closely related to life in the law school, that I think the next history of American jurisprudence should discuss when it comes time to tell the story over again, this time in a way that will make it more difficult to scramble the proper names.

There also have been enormous changes in law faculties since 1870. There are more schools with more similarity among them and simultaneously continuing, perhaps increasing, stratification. There are more students and I believe more diversity among them, even among the white males. Still, most faculty do less teaching than did the individuals who occupied their chairs fifty years ago at the same time that everyone says that teaching feeds into scholarship. What has been the impact of all of these changes on the lives of scholars and their scholarship? Of scholars and scholarship on understanding these changes?

Simultaneously, there have been enormous changes in universities since 1870. They are larger and more diverse at the same time that bureaucracy has made them both more subject to centralized control and less amenable to detailed monitoring. This has resulted in changes in, among other things, tenure

152. See Alfred S. Konefsky, *Men of Great and Little Faith: Generations of Constitutional Scholars*, 30 BUFF. L. REV. 365 (1981).

standards, both with respect to teaching and scholarship. Have any of these changes had any impact on scholars or scholarship or vice versa?

Over the past fifty years there have been significant shifts in the acceptability of social science scholarship of varying kinds. As Duxbury makes clear, this is a direct consequence of realism. Yet, most legal scholarship today can easily be described as normative, directed toward the justification, including criticism, of norms, just as was the case in 1890, though there has clearly been a shift in the pervasiveness of normative justification directed at the United States Supreme Court. What do both these changes and these relative stases say about scholars and their scholarship?

Since 1870 there has been a significant change in the size of government at all levels and of the access of academics to all of this government, especially at the Federal level. While only two legal academics—John Henry Wigmore and William Reynolds Vance—seem to have participated in national government during the First World War, starting with the New Deal, law professors have increasingly participated in this growing apparatus of central control. Experience is supposed to make a difference in one's life and scholarship. Has this been the case?

One has the sense that the cohesiveness in groups that comes from being separate and against the crowd makes for a more stimulating intellectual environment. Langdell's Harvard, Twenties Columbia, Thirties Yale, Fifties Harvard, Fifties and Seventies Chicago, as well as Critical Legal Studies, a time with no site, come to mind as potential examples. Could one find other equally cohesive groupings where the intellectual product is of negligible significance? If so, what made these groups stable and exciting, but nonetheless, their ideas not memorable?

Well, that's enough to start with, I suppose. Still, even answering all of these questions would not fully bring human actors to American jurisprudence. There would have to be some juicy gossip as well. How about answering these questions, for starters. Did Christopher Columbus Langdell really make a fortune in Western Massachusetts real estate mortgages and if so where did all that money go? Was John Chipman Gray as isolated from his colleagues as his comments about Langdell would indicate? Why was Wigmore on the outs with the Harvard faculty? Why were Roscoe Pound's graduate students so devoted to him? Was Wesley Hohfeld gay? Did Karl Llewellyn really cut down on his drinking after Young B. Smith demanded an undated letter of resignation from him or did Smith just give up caring? Who really knew Robert L. Hale and his work in 1932?

Walton Hamilton and his work in 1928? What exactly were Lon Fuller's politics? Henry Hart's? Why did Ronald Coase hate British socialism? Does Duncan Kennedy wear briefs or boxers? Does Richard Posner ever sleep?

